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M. 140



REPORTS
OF
CASES IN BANKRUPTCY,
ARGUED AND DETERMINED
IN
THE COURT OF REVIEW,
AND ON
APPEAL BEFORE THE LORD CHANCELLOR.
WITH
A DIGEST OF THE CASES
RELATING TO
BANKRUPTCY IN ALL THE CONTEMPORANEOUS REPORTS.

BY
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AND
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BARRISTERS AT LAW.

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CASES IN BANKRUPTCY

ARGUED AND DETERMINED

IN

The Court of Review, &c.

Ex parte EMANUEL COOPER and others.—In the matter
of WILLIAM SAWER YOUNG.—

*Serjeants' Inn
Hall,
March 22,
Nov. 5, 1841,
and April 25,
1842.*

THIS was the petition of trustees of a joint stock banking company claiming a lien on the bankrupt's shares in the bank, and on other documents deposited with them by the bankrupt, and praying for the usual Order as in the case of an equitable mortgage.

The bankrupt was a shareholder in a joint stock banking company, one of the rules of which was, that the bank should have a lien on the shares of every shareholder for any balance due from him to the company. The bankrupt also carried on the separate trade of a banker under the firm of "Young & Co.," and was indebted to the banking company in a large balance on a running account. To secure this balance, in addition to the company's lien on the shares, the

By the deed of settlement of the company (styled the London and County Banking Company), dated the 4th August 1836, to which the bankrupt was a party, it was provided, that all debts and engagements to the company of any shareholder, either for cash advances or balances, or running bills or notes passed to the company by each shareholder, or his partner, or otherwise howsoever, should be at all times and in all cases set off against all shares and stock of such shareholder, whether such debts or engagements should be the debts or engagements of such shareholder, individually, or jointly, or in partnership with any other person or persons.

bankrupt had deposited with the company two policies of life assurance, and other securities; but no notice of the deposit had been given to the insurance office. *Held*, 1st, That, no joint creditors of the banking company having proved under the fiat, the company were entitled to prove for the residue of their debts, after deducting the proceeds of their securities; 2ndly, That the want of notice to the insurance office was not conclusive evidence of the policies being in the reputed ownership of the bankrupt, and that, no evidence having been adduced of such reputed ownership, the banking company were entitled to the policies in question.

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It was provided also by another clause in the deed of settlement, that any member of the company, being indebted to the company, should forthwith upon demand pay and discharge such debt, without requiring the accounts of the partnership to be taken, and as if such member was a debtor to the company without being interested as a partner therein; and, in default of payment, might be sued for the amount to be recovered by way of liquidated damages, subject to any claim he might have in the capital of the company.

The bankrupt carried on the business of a banker in West Smithfield, London, under the firm of "*Young & Co.*;" and on the 23rd March 1840 the present fiat was issued against him, when he was indebted to the banking company in the sum of 1423*l.* 3*s.* 5*d.* for monies advanced by the bank. At the time of his bankruptcy, he was the proprietor of twenty shares in the banking company, which were of the value of 200*l.*

On the 26th October 1838, the bankrupt deposited with the banking company the title deeds of a freehold house and premises in West Smithfield, accompanied with a written memorandum, which stated the deposit to have been made in consideration of the advances which the company had made, or might thereafter make, on bills of exchange or otherwise. At the time of this deposit the bankrupt was entitled to one-ninth of the reversionary estate in the premises comprised in the deeds, after the death of *Mary Young*, his mother; which reversionary interest was valued at 98*l.* 5*s.*

On the 30th January 1840, the bankrupt deposited with the banking company two policies of insurance on his own life, one for the sum of 999*l.* in the Economic Life Insurance Office, and the other for the sum of 1000*l.*

in the Equitable Insurance Company. This deposit was also accompanied with a memorandum in writing under the bankrupt's hand, stating the particulars of the policies, and then adding: "which I hereby assign to you as collateral security for any advance you may make to my house of 'Young & Co.' in their account with your bank." These policies were valued at 249*l.* 11*s.* The Economic Life Assurance Company was conducted upon the principle of sharing a portion of its profits amongst the holders of policies; and, by the constitution of the Equitable Life Assurance Company, the assured are mutual assurers, each one to the other, the company dividing its profits among the holders of policies at certain periods. It was contended, therefore, that the bankrupt, by insuring, became a partner in each of these companies.

It appeared from the statement in the course of the argument, though it was not alleged in the petition, that the bankrupt carried on the separate business of a banker quite distinct from the business of the banking company, and that he kept an account with the company as a customer, and that the debt due from him to the company arose in respect of monies drawn out by his checks as a customer, and in respect of discounting bills on his separate trade with the banking company.

Mr. *Swanston*, and Mr. *Bacon*, in support of the petition. In regard to the lien of the banking company on the bankrupt's shares in the bank, the case of *Ex parte Plant* (a) is an express authority in their favour. There, by a clause in the deed of settlement of a banking company, it was stipulated that the company should have

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(a) 4 Deac. & C. 160.

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a lien on the shares of such proprietors as were customers and indebted to the bank, and an abstract of this provision was indorsed on the certificate of the share held by each proprietor; the bankrupt at the time of his bankruptcy was the owner of thirty of these shares, and had in his possession the certificate of ownership thus indorsed, being then largely indebted to the bank for advances; and it was held that these did not pass to his assignees, under the clause of reputed ownership, so as to defeat the lien of the bank, which had been provided for in the deed.

The objection, as we understand, that is to be made in the present instance to the right of proof by the banking company for any deficiency, after realizing their securities, is, that the bankrupt was a partner in the banking company, and that one partner cannot prove against another, in competition with the general creditors. But there is a distinction in the right of proof between partners, where one partner carries on a separate trade on his own account, wholly distinct from that of the partnership. In such case, it is clear that one partner may prove against the other. In *Ex parte St. Barbe* (a), it was decided that where partners are engaged individually in other concerns, if the concerns are distinct, proof may be made in bankruptcy of debts as between the different estates; but not, if they are merely branches of the joint concern. This distinction is clearly laid down by Lord Eldon in his judgment, who, in alluding to Lord Thurlow's decisions in the case of *Shakeshaft, Stirrup, and Salisbury* (b), says, that, "the three partners carrying on the business of cotton manufacturers in Lancashire, and two of them in London,

(a) 11 Ves. 413.

(b) 6 Ves. 123, 743, 747.

there could not be proof by the three against the two; but if the trades were perfectly distinct, then the three, as cotton manufacturers in Lancashire, might be creditors upon the separate concern of the two, as ironmongers in London." The same point was afterwards ruled by Lord Eldon in *Ex parte Tresham*(a). In the present case, the bankrupt carried on a separate trade perfectly distinct from the business of the banking company; the fact therefore of the bankrupt having a joint interest in the company is no bar to the proof.

The subsequent case of *Ex parte Sillitoe*(b), though it may be relied on by the other side in favour of their argument, perfectly accords with this decision. There two partners of a large banking firm carried on a separate trade as ironmongers, and a debt arose from the aggregate firm to the separate trade, in respect of monies procured for the benefit of the aggregate firm, on the credit of the indorsement of bills by the separate firm; and Lord Eldon held, that under these circumstances, no proof could be made on behalf of the firm of the two against the aggregate firm in respect of that debt. Why? Because, as Lord Eldon says in his judgment, "if an individual partner has nothing more to say than this, that he has lent 100*l.* to his partnership, the strict rule (that is, that one partner shall not prove against another) immediately applies to him, and shuts him out from the benefit of proof; if it were sufficient to state, that the partner would not have lent the 100*l.* but as a separate trader, the rule is at an end. We are not, therefore, merely to consider the question, whether *John* and *William Jackson* were partners as ironmongers; but whether this is to be considered a transaction between trade and

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(a) 1 Rose, 146.

(b) 1 G. & J. 374.

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trade;" and in a subsequent part of his judgment he adds, that these two persons were not dealing with the aggregate firm in the trade of ironmongers, "not dealing in their separate articles, but dealing for the convenience of the general partnership, by advancing money to retire bills discounted by the Bank of England." The decision of this Court in *Ex parte Grazebrooke* (a) went rather beyond the former cases; for in that case there was no distinct trade, but there was an ascertained debt on a balance acknowledged to be due from one partner to another, at the dissolution of their partnership; and the Court said, that "the debt was contracted at the time of the dissolution, and became a separate legal debt suable at law."

Supposing, of which however there is no evidence in the present case, that there are any outstanding liabilities, for which the petitioners are jointly liable with the bankrupt, still that circumstance will not affect the right of proof, but will merely operate as a stay of the dividends upon the proof. In *Ex parte Moore* (b), it was held, that a partner cannot prove against his copartner, upon merely indemnifying the joint estate. The objection there taken to the proof was, that such partner could not be considered as a surety who had paid the debt, or any part thereof in discharge of the whole debt; but that objection has no application to this case. *Ex parte Castell* (c), however, is decidedly in favour of the right of the present petitioners. In that case, five persons carried on the business of bankers in partnership at York, and four of the five carried on the business of bankers at Wakefield; and it was held, that a proof might be made by the firm of the five against the firm of

(a) 2 Deac. & C. 186. (b) 2 G. & J. 166. (c) 2 G. & J. 124.

the four, in respect of a balance arising out of dealings between the two firms of the York and Wakefield banks. Sir *John Leach* applied his judgment in the last case to two other cases then depending before him, involving the same point—one, *Ex parte Brenchley*, where the debt arose from advances of money made by the larger firm (who were bankers) to the minor firm—and the other, *Ex parte Stroud*, where the debt due by the one firm to the other was, in respect of the employment of the surplus monies which the larger firm had in their hands as bankers; and he decided, that in each of these cases the debt was to be considered as a dealing by the bankers in the way of their trade. His Honor there says, that “where a firm of two or more partners carry on a distinct trade, the creditors of the *larger* firm are not the creditors of the *smaller* firm; and consequently, when the firm of two or more prove against the *larger* firm, they do not prove against their own creditors (*a*). Upon this reasoning, I cannot but still doubt, whether the smaller firm of two or more is not in all cases to prove against the larger firm; and whether it can make a difference, that the debt due to the smaller firm is in respect of a dealing in the way of their distinct trade, or in respect of any other dealing with the larger firm. Consistently, however, with any principle stated in the case of *Ex parte Sillitoe*, it does appear to me, in all the three cases in question, the one firm is entitled to prove against the other firm.” One of the most recent

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(*a*) Although the creditors of the larger firm are not the creditors of the smaller firm, they have still a lien upon the surplus of the separate estate of each individual member of the smaller firm; and therefore, if the minor firm of B. and C. be permitted to prove against the firm of A. B. and C., B. and C. would be proving in competition with creditors to whom they were each separately liable.—E. E. D.

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cases decided, before this tribunal was established, is *Ex parte Cooke* (a), where one of two partners carried on a separate trade, and proof was admitted by the one against the two.

Having now gone through all the cases as to ordinary partnerships, it remains still for the Court to consider, whether there is not a distinction between the case of a common partnership, and one like this, where there is a company consisting of no less than 800 proprietors. Here, under the provisions of the deed of settlement, there was every half-year a settled account between the banking company and their customers, and the account was made up regularly in the pass-book of each customer. On the latter ground alone therefore, namely, that the debt is an ascertained debt, we submit that the petitioners are entitled to prove against the estate of the bankrupt, independently of the other ground, that he carried on a separate and distinct trade. The only question here is, whether the Court will direct an inquiry as to the amount of the outstanding debts of the banking company, and stay the dividends on the proof until those debts are satisfied. That is the only qualification which, as we submit, the Court can direct as to the right of proof.

With respect to the policies of assurance, there may be a question raised by the other side, whether the insurance companies had notice of their being deposited with the petitioners. This point has, however, lately been decided by the Vice-Chancellor in the case of *Duncan v. Chamberlain*, which came before him on the 4th December last, where it was held, that a party who had effected a policy of assurance in a mutual assurance

(a) Mont. 228.

company was to be considered a partner in the insurance company, and therefore that no formal notice was necessary to be given to the company of any deposit of the policy with a third person; as notice to one partner amounted to notice to all.

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 COOPER
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Mr. *J. Russell*, and Mr. *Randall*, for the assignees. There are three questions of importance to be decided in this case: 1. As to the right of proof, which we deny; 2. Supposing there to be a right of proof, then, whether the petitioners have a right to retain the shares which the bankrupt had in the company; and 3. Whether notice was not necessary to be given to the insurance companies of the deposit of the policies of assurance.

As to the 1st question,—we concede that the London and County Banking Company was a legal banking company, but not different in any respect from the case of a common partnership. The whole of the debt in the present instance consists of pecuniary advances made by the banking company to the bankrupt; and a case of this description is very different from one, where there are different firms of trading, and the dealings between the firms are in respect of goods sold and delivered by one firm to the other. If *Ex parte Grazebrook*, which has been cited by the other side, was decided on the ground that one firm can prove against the other for mere pecuniary advances, that case cannot stand; but the point did not there arise. We put the question shortly in this form, and we submit that it cannot be controverted: where there are joint liabilities of a partnership outstanding, one partner cannot prove against another. It is perfectly immaterial, whether there is an ascertained balance or not. This principle was fully

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recognized in *Ex parte Ellis* (a), where it was decided, that a partner cannot prove or claim, until all the joint debts are paid. In that case, the petitioners sought only a qualified right of proof; but the Court said, "You cannot prove at all." He then offered to indemnify the bankrupt's estate from any joint liabilities, but the Court said, "No—that wo'nt do." In the case of *Duncombe v. Griffin* (b) it was held by the Vice-Chancellor, that one partner could not prove against another, even for the mere purpose of staying his certificate. As to *Ex parte Sillitoe* (c), that case appears to decide the point against the petitioners, instead of being an authority in their favour; for Lord *Eldon* there held, that there were only two cases excepted from the operation of the general rule, that one partner cannot prove against another; the first is, where one partner fraudulently abstracts monies from the partnership fund; and the second, where one partner is engaged in a distinct trade, and there are separate dealings of goods supplied by one firm to the other. Lord *Eldon*, after taking further time to consider of his judgment in *Ex parte Sillitoe*, stated, "that he had carefully examined all the cases relating to this question of proof by partners as separate traders, in competition with their joint creditors, and that they were all cases in which the articles of one trade had been furnished to another trade; and that there was no case in which the exception had been allowed, where money had been advanced to the partnership by one or more of the partners." Sir *J. Leach*'s principle, on which he grounded his differing in opinion from Lord *Eldon* in *Ex parte Castell*, was this: that where there is a firm of five partners, and a separate

(a) 2 G. & J. 312.

(b) 18 May 1829.

(c) 1 G. & J. 374.

firm of two, as the creditors of the larger firm were not the creditors of the smaller firm, the latter firm, in proving against the larger firm, would not come in competition with their own creditors (a).

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2. As to the right of the banking company to retain the shares of the bankrupt,—the petitioners have relied on the clause in the deed of settlement, which provides that all debts and engagements to the company of any shareholder may be set off against all shares and stock of the shareholder. Now, the petitioners cannot, by virtue of this clause, carry their claim any higher, than if there had been an actual assignment of the shares from the bankrupt for the use of the petitioners; and, in that case, the question of order and disposition will arise. For if there had been an actual assignment, it would not have been complete, unless the shares had been transferred into the name of the assignee in the company's books; and still less will a mere covenant pass any interest. The very transaction of one partner assigning his share in the partnership stock to his co-partner, when he continues to act as a partner, must necessarily be void, in the event of bankruptcy. In the present instance, the shares stood in the name of the bankrupt in the company's books, and he must have been considered the apparent owner, in the eye of the world. The lien, therefore, of the banking company is nothing, the moment that bankruptcy intervenes. The old case of *Ryall v. Rolle* (b) decides this case completely. The only question there, to which we beg to call the attention of the Court, was the validity of the assignment by one partner to the other of his moiety in the partnership stock; and it was agreed by all the

(a) See note, *ante*, p. 7.

(b) 1 Atk. 165.

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judges who decided that case, that the circumstance of the partner, who had assigned over all his share of the partnership trade, being suffered to continue still acting as the owner of it, was a fraud against other persons, and that the assignment thereupon was not good against creditors under a commission of bankruptcy. [Sir *John Cross*. There is some difference, in point of fact, between that case and this; for here the creation of the lien and the creation of the shares are simultaneous; the bankrupt therefore could never have been the reputed owner.] He would have appeared so from the books of the company; for the shares continued to stand in his name in their books. The principle we are now contending for was acted upon in the more modern case of *Nelson v. The London Assurance Company* (a), where certain directors of the company, transacting business with the company in their separate and private capacities, assigned their salaries and shares to the company, to secure the private debts that might be due from them to the company in respect of such transactions, and empowered the company to direct the treasurer to retain and sell the same for payment thereof; but by a clause at the end of the deed it was provided, that until there should be some order of the directors made, every director might receive his salary, and transfer his shares; and before any such order made, one of them became bankrupt; and it was held, that his shares were within his order and disposition at the time of his bankruptcy, and passed to his assignees. We submit, that there is no difference between that case and this. But we contend, that, on general principles, the assignment of one partner's share to his co-partners, when he is permitted to

(a) 2 Sim. & St. 292.

act in all respects as if he continued to hold such share, is of no avail whatever in the case of bankruptcy. In the case before cited of *Ryall v. Rolle*, Lord *Hardwicke* says, that “if it was to be laid down, that a share of the partnership trade mortgaged to a partner is not necessary to be delivered, it would let in all the inconveniences, which were to be prevented by this statute (a).” [Sir *John Cross*. It does not appear in the present case, as yet, that any body, except the company, had notice that the bankrupt was ever entitled to these shares.] In all the cases involving the point, as to the reputed ownership of the bankrupt’s shares in a joint stock company, no one ever knew, except the company themselves, whether the bankrupt was a shareholder in the particular gas company, or canal company. [Sir *J. Cross*. In the case of *Ryall v. Rolle*, however, the public knew that the partner, who had assigned his share in the brewery, was still interfering in the concern as an ostensible partner, and thus acquired a false credit with the world.] In every one of these cases of the transfer of shares in a joint stock company, without notice to the company, the decision goes upon this—that if the name of the bankrupt stands in the books of the company, as owner of the shares, that is enough to constitute him reputed owner, whether he tells other persons that he is the owner, or not, just as much as when goods are standing in a bankrupt’s name in the books of a wharfinger. The intention of the legislature was evidently to put down such stipulations as this clause of set-off in the deed of settlement of this company; for, if the company had been established under the provisions of the 7 *Geo.* 4. c. 46., then the 1 & 2 *Vict.* c. 96. s. 4. is express,—that the share of an

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(a) 21 *Jac.* c. 19. s. 11.

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individual member cannot be set off by him against any demand of the company.

3. As to the necessity of giving notice to the insurance companies of the deposit of the policies of assurance,—there is hardly a case in which this point has arisen, where the members of the insurance company were not in reality co-partners. In *Ex parte Vallance* (a) the party making the deposit of shares in a gas company was a co-partner; and yet, as no notice was given to the company of the deposit, it was held that the shares passed to the assignees. So in *Ex parte Spencer* (b), the depositor was a partner in the gas company on the face of the transaction. But we contend, that the circumstance of a party having a share in the profits of a concern does not necessarily constitute him a partner; as if one member of a partnership assigns to me all his profits in the concern, that does not make me a partner with the others. Still, admitting the bankrupt to be considered a partner in those companies, we submit that if a partner of this description assigns his share to a third person, the company are not *ipso facto* to be held as having notice of the assignment. In *Ex parte Burbridge* (c), it was held by the Lords Commissioners, that the private knowledge, which one of the directors and the actuary of an insurance company had of an assignment of shares upon trust, did not operate as notice of the trust to the company, so as to take the case out of the 72d section of the Bankrupt Act, in regard to reputed ownership. There, too, as in the present case, the policy was effected with the Economic Assurance

(a) 3 Mont. & A. 224; 2 Deac. 354.

(b) 3 Mont. & A. 697; 1 Deac. 468.

(c) 1 Deac. 131; S. C. *Ex parte Watkins*, 2 Mont. & A. 358.

Company. And in *Williams v. Thorp* (a), where the policy was, also, like one of those in the present case, in the Equitable Assurance Office, and the bankrupt had assigned it, without giving notice to the office, it was held that his assignees under the commission were entitled to the benefit of it. In the case of the *Lancaster Canal Company* in the matter of *Dilworth* (b), the party there making the pledge was the treasurer of the company, who had become bankrupt, and the parties to whom the pledge was made were the company themselves; and yet it was held, that as certain forms were not complied with, which were necessary upon the transfer of shares, the shares remained in the order and disposition of the bankrupt. Even, where a bond debt is assigned, and the bond itself delivered to the assignee, notice of the assignment is still necessary to be given to the obligor, in order to take the case out of the clause of reputed ownership; *Ex parte Monro* (c). But in all the numerous cases we have cited relating to the assignment of shares in joint stock companies, the circumstance is prominent on the face of every one of them, that the party making the assignment or deposit was himself a partner, as much as the bankrupt in the present case; and yet it has been held, that a formal notice of the assignment or deposit must be given to the company; it is too late now, therefore, to urge the argument, that the party making the deposit was a partner in the company, and that no notice was necessary. In all these cases it has been uniformly held, that an express notice must be given, and that an indirect notice is not sufficient. We submit, however, that the deposit by one of

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and others.

(a) 2 Sim. 257.

(b) Mont. & A. 94; 1 Deac. & C. 411.

(c) Buck, 300.

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the members of an insurance company of the certificate of his own share with a third person, does not amount to a partnership transaction; and therefore the argument of the other side, as to notice to one partner being notice to the others, does not apply in this case.

On this last branch of the argument, therefore, we contend for these three propositions: 1st. That the bankrupt was not strictly a partner in either of the insurance companies; 2ndly. that the deposit of his policies with a third party was not a partnership transaction; and 3rdly, that whether it was so, or not, or whether the bankrupt was a partner, or not, an express notice was necessary to be given to the insurance companies.

Mr. *Swanston*, in reply. As to the first part of the argument urged in contradiction of our right of proof, there will be little difficulty in answering it; for in the present case the bankrupt carried on a separate trade, perfectly distinct from that of the banking company, and the dealings were between trade and trade. With respect to the case of *Ex parte Sillitoe* (a), which has been so much relied on by the other side, Lord *Eldon's* judgment there was founded on the point, that the debt of the one firm to the other was, not in respect of the dealings of the distinct trade of the minor firm, but in respect of a dealing for the convenience of the general partnership, namely, by the minor firm advancing money to the larger firm, to retire bills discounted by the Bank of England. Lord *Eldon* says, that the question to be decided was, "what is the principle upon which it can be said, that the rule of law is to be relaxed in respect

(a) 1 G. & J. 374.

of the dealings of these two partners, because they were ironmongers, not dealing in the trade of ironmongers, not dealing in these separate articles, but dealing for the convenience of the general partnership." It was not incidental to their trade of ironmongers to make advances of money to the bankers, who constituted the larger firm; this was not a dealing between trade and trade. [Sir *John Cross*. In that case, it seems difficult to suppose that the dealings of the bankers with the two *Jacksons*, the minor firm, were not dealing with them, *as partners*, in some trade or other. It would have been different, if the advances had been made by only *one* of those individuals to the bank.] As to the argument of the other side, that the dealings must be in *goods*, in order to constitute a right of proof by one firm against the other, the decision of Sir *John Leach* in *Ex parte Castell* (a), is quite against that construction; for there the dealings of the two firms were entirely as bankers, and not in any way relating to goods. Money is as much the subject of dealing between bankers, as iron in the trade of ironmongers. The exception to the rule is not confined to dealings in goods, but includes all the dealings incidental to the separate trade of the minor firm.

As to the second point argued by the other side in opposition to the lien of the banking company on the shares, the provision of the deed of settlement is express, that the shares of every shareholder should be subject to his debts or engagements with the banking company; and the decision of this Court in *Ex parte Plant* (b) is an express authority in support of such lien. In the case of *Nelson v. The London Assurance Company* (c), there

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(a) 2 G. & J. 124.

(b) 4 Deac. & C. 160.

(c) 2 Sim. & St. 292.

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was something previously to be done, namely, some order of the directors to be made, before the lien could attach; and as this order was not made before the bankruptcy of the party, no lien would of course exist.

As to the third point contended for, the necessity of notice to the insurance companies, there may be somewhat more difficulty. We must rely, however, on the express decision of the Vice-Chancellor on the point in *Duncan v. Chamberlain*, where he acted upon the Master's report in the case, which found that the members of the Equitable Assurance Company were partners. Now, it cannot be denied, that notice to one partner is notice to all. There is no other case, however, in which this precise point has ever yet been raised, namely, whether a transfer of shares by one partner in a company is not notice, of itself, of such transfer to the other member of the company.

Cur. adv. vult.

Westminster,
Nov. 6.

The petition came on again this day, as set down to be spoken to. Since the last hearing, the following allegations were introduced into it by way of amendment. That the bankrupt, for several years before, and up to the time of, his bankruptcy, carried on the business of a banker in West Smithfield, under the firm of *Young and Son*, which was a distinct and separate business from the business carried on by the London and County Banking Company; and that neither the banking company, nor any of its shareholders, had any interest whatever in this separate business of the bankrupt. That the bankrupt was a customer of the London and County Banking Company, and kept an account with them in the name of the firm of "*Young and Son*," in the same manner as the

other customers of the banking company; and that the debt due from the bankrupt to the company arose in respect of monies drawn out of the bank by means of the bankrupt's cheques, and on account of bills of exchange discounted by the company for the bankrupt in his separate trade; and that the debt due from him to the company was in respect of trade bills so discounted, and monies advanced by the company to the firm of *Young and Son* upon the bankrupts' cheques.

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and others.

Mr. *Bacon*, in support of the amended petition. The assignee has made an affidavit that several debts were still due and unpaid from the banking company. But it does not appear that any creditor of the banking company has attempted to prove any joint debt against the bankrupts' estate. He then referred to the case of *Duncan v. Chamberlain* (a), which was cited in the former argument, to show that there was no necessity, in the present case, to give notice to the insurance office of the deposit. He also relied on *Edwards v. Scott* (b), where it was decided, that in order to constitute a case of reputed ownership, some positive evidence must be given that the bankrupt was reputed to be the owner of the property in question.

Mr. *J. Russell, contra*. As to the right to the policies of assurance, there can be no question but that the petitioner must fail in establishing that right, according to the doctrine laid down in all the cases from 1827 to 1840. It is indispensable, to render the assignment of a policy of insurance valid, that express and formal notice

(a) Cor. V. Ch., 4 Dec. 1840.

(b) 1 Man. & G. 962; 2 Scott, N. R. 266.

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and others.

of the assignment should be given at the office of the insurance company.

Then, as to the right of one partner to prove against the estate of his copartner, it was decided in *Ex parte Adams* (a), that where two partners carry on business separately, as they are both liable for the same joint debts, the solvent partner is not entitled to prove under the bankruptcy of his copartner a debt for goods sold by his distinct house to the firm, until the joint creditors have been satisfied. So, in *Ex parte Sillitoe* (b), which was cited in the former argument, where two partners of a larger banking firm carried on a separate trade as ironmongers, and a debt arose from the aggregate firm to the separate trade, in respect of monies procured for the benefit of the aggregate firm on the credit of the indorsement of the separate firm, Lord Eldon held that no proof could be made on behalf of the firm of the two against the aggregate firm in respect of that debt. [Sir John Cross. In *Ex parte Sillitoe* (b), it appeared that the separate firm had indorsed the bills, not in the course of dealing in their separate trade as ironmongers, but in the course of the banking business. They were in fact all wheels of the same machine.] The principle is in all these cases, as decided in *Ex parte Ellis* (c), that one partner cannot prove or claim against the estate of his copartner, until all the joint debts are paid. [Sir J. Cross referred to *Ex parte Moore* (d), where Lord Eldon held that a partner, indemnifying the joint estate to the satisfaction of the joint creditors, might prove against the separate estate of his copartner.] The indemnity must then be accepted by every joint creditor as a discharge of his debt; the partner could not prove,

(a) 1 Rose, 305.

(c) 2 G. & J. 312.

(b) 1 G. & J. 374.

(d) 2 G. & J.

until he has either paid the whole of the joint debts, or part in satisfaction of the whole. A mere undertaking to pay is not sufficient.

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Ex parte
 COOPER
 and others.

Mr. *Bacon* in reply. In all the cases cited, it appeared that there were not only joint debts outstanding, but that those debts were proved or claimed under the commission by the joint creditors.

Sir JOHN CROSS.—The objection that has been urged to the proof by the respondent's counsel is, that there are various joint creditors of the banking company; none of whom, however, appear to have made any proof or claim under the fiat against the bankrupt. With respect to the other point, of the want of notice to the insurance office, I confess I could never understand why a man, who has assigned a debt and the instrument by which it is secured, is to be deemed the reputed owner of the debt, merely because he does not give notice to the party who is liable to pay the money. The cases most difficult to understand on this subject are those of *Ex parte Colvill* (a), and *Buck v. Lee* (b). In order to come to a right determination on this point, it is necessary to consider well the words of the 72d sect. of the Bankruptcy Act, namely, "if the bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner." But I will defer at present giving my final opinion.

Cur. adv. vult.

(a) Mont. 110.

(b) 3 Nev. & Man. 580.

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COOPER
and others.

1842, April 25.

Sir JOHN CROSS.—The petitioners claim a debt of 1423*l.*, and they seek to avail themselves of certain securities, and to be admitted creditors for the residue. On the part of the assignees, several objections have been made to this case; and one of them being the subject of an appeal in a similar case, this has stood over by consent, till that case should be determined. The petitioners are a numerous banking company, not established pursuant to the act of 7 Geo. 4. c. 46., nor an incorporated company. The bankrupt was a partner and shareholder in that company, in which there was a rule to this effect, that the company should have a lien upon all shares, as a security for advances made to shareholders. The first objection on the part of the assignees is, that the petitioners, being in partnership with the bankrupt, are not intitled to come in as creditors, in competition with the creditors of the company. To that there are two answers, first, that there is no evidence before the Court of any such competition in fact; it not appearing that any joint creditors of the bank have proved debts under this fiat. Secondly, that the bankrupt carried on a *distinct trade*, and therefore the petitioners have a right to prove, even if there were any such competition. For it appears that, in fact, the bankrupt was himself a banker, carrying on a separate business as such under the name and firm of *Young & Co.*, but was a shareholder in his own name; and I am therefore of opinion, that, in fact, his dealing with the petitioners was in a distinct trade. But, be that as it may, I find no evidence of any competition between the petitioners and any of their own creditors. I am therefore of opinion, that the petitioners are entitled to come in as creditors under this fiat.

As to the securities, of which the petitioners seek to have the benefit, the first is a *real security*, to which, if

the petitioners are to come in as creditors, there is no objection. The next security is the lien upon twenty shares of 10*l.* each, which the bankrupt held in the banking company. And to this it is objected, that the bankrupt was the reputed owner of these shares at the time of his bankruptcy, within the meaning of the 72d sect. of the 6 Geo. 4. c. 16. But of such reputation the assignees have offered no evidence whatever; and therefore I am of opinion, that the petitioners are intitled to retain those shares, in discharge of so much of their debt.

The next security is a deposit of two policies of insurance upon lives, deposited by the bankrupt as a security for any advances the company might make to him. To these the same objection has been made, namely, that the bankrupt was the reputed owner of the policies at the time of his bankruptcy, and therefore they belong to the assignees. But, on their part, no evidence has been offered of such reputation; but their counsel have rested their claim to these policies, solely, on the ground that the petitioners have not shown that they gave notice of the deposit to the insurers; and they insist, that this circumstance alone is conclusive evidence in favour of the assignees. But I was of opinion, in this as in the former case, that the want of proof of such notice was not conclusive evidence, and that there was no sufficient evidence before me of the bankrupt being such reputed owner; but, as this question was then depending on appeal, the judgment of the Court was suspended till that appeal should be determined. The Lord Chancellor has since affirmed the former judgment of this Court. (a)

Common Order.

(a) See post, *Ex parte Smith, re Styau.*

1841.

Ex parte
COOPER
and others.

1841.

*Westminster,
April 26 & 27.*

The Court of Review has jurisdiction to entertain a petition, complaining of an abuse of the execution of an Order made for the sale of property under an equitable mortgage; but the petition must be that of a creditor, or party interested in the bankrupt's property, and who is also a party aggrieved.

When a petition praying for costs is dismissed, it will, in general, be dismissed with costs.

**Ex parte DAVID ELWIN COLUMBINE.—In the matter of
GEORGE WHITEHEAD.—**

THIS was the petition of a party claiming to be a creditor of the bankrupt, and to have a lien as an attorney on certain deeds of the bankrupt in his possession, and praying to set aside the sale of some property to which those deeds related.

The petition stated, that the petitioner had acted for several years as the attorney for the bankrupt, in respect of his business of a certificated conveyancer, and also in respect of the printing business, which the bankrupt carried on in Fleet Street, London. In June 1834 the bankrupt handed over to the petitioner the several deeds relating to a freehold house in Boyle Street, Burlington Gardens, where the bankrupt carried on his business of a conveyancer, and several other deeds relating to a leasehold messuage at Dulwich, for the purpose of preparing a memorandum of deposit of such deeds to a certain creditor of the said bankrupt, for securing the debt due to him; but the matter was not proceeded with; and, the proposed arrangement being abandoned, the deeds remained in the possession of the petitioner, with the exception of the two last conveyances of the respective properties, which the bankrupt soon afterwards took away, to deposit the same with *Cocks and Biddulph*, his bankers, as a security for advances. The bankers afterwards gave up the possession of these two deeds to the bankrupt, for enabling him to raise money on them for other purposes; and he then obtained a loan on them from one *William Michael Papineau*, who brought the deeds to the petitioner to prepare the necessary memorandum of deposit, which was accord-

ingly done by the directions of the bankrupt. The petition alleged, that at this time a large balance was due from the bankrupt to the petitioner for costs, and otherwise, in respect of the dealings and transactions between them, and that the petitioner held the title deeds as a security for what was due to him; and that if he had been applied to to part with them, he would have refused to do so, or to do any act to prejudice his lien on them. That the bankrupt did actually, on the 8th August 1839, apply to the petitioner for the deeds, but that the petitioner declined to deliver them, until the bankrupt should settle the balance due to him; and the deeds have ever since remained in the possession of the petitioner. That the accounts rendered by the petitioner, which were examined adopted and allowed by the bankrupt, after giving the bankrupt all credits to which he was entitled, showed a balance exceeding 1000*l.* to be due to the petitioner, which was still owing to him at the date of the fiat; and which balance would be considerably increased, if the account was opened. It appeared, however, that the bankrupt and the assignees refused to recognize these accounts, and alleged that the petitioner was actually indebted to the estate of the bankrupt.

The petition then alleged, that the fiat was issued by *William Michael Papineau*, at the instance of the bankrupt; and that the whole of the proceedings have been carried on under the bankrupt's directions. That the petitioner was summoned to attend before the Commissioner on the 17th July last, to produce the deeds in his possession, relative to the property in Boyle Street and at Dulwich, which he objected to do, on the ground of his lien; when the Commissioner threatened to sum-

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mon the petitioner to attend with the deeds from day to day, in order that copies might be taken of them. To avoid this inconvenience, the petitioner consented to deposit the deeds with the solicitor to the fiat for a fortnight, without prejudice to the petitioner's lien. At the end of this period, the solicitor brought the deeds back to the petitioner, but served him with a demand of the deeds, on behalf of the assignees.

That, by agreement between the solicitor to the fiat and the bankrupt with Mr. *Papineau*, it was agreed that the premises to which the deeds related should be put up to sale, and that although a marketable title could not be made, unless all the deeds were handed over, yet Mr. *Papineau* could become the purchaser of the property at an under-value. That great haste and precipitation were used in the proceedings relative to the sale; and that the conditions of sale were framed by the solicitor of Mr. *Papineau*, and contained, among others, the following improper stipulations:—"That the vendor will deliver to the purchaser, or his solicitor, within three days from the sale, an abstract of the title deeds in his possession; but any other abstract, or the inspection of any other deeds or documents, are to be obtained at the purchaser's expense; and all copies of deeds, wills, and all certificates and other documents, and copies thereof, that may be required for the purpose of verifying the abstract, or otherwise, are also to be procured by the purchaser, and at his expense, as also the getting in and assignment of any outstanding terms. Unless the purchaser shall, within ten days from the delivery of the abstract, declare in writing his objection to the title, he shall be deemed to have accepted thereof."

That the effect of these conditions was, that no other

purchaser could be procured than *W. M. Papineau*, as no other person would have completed the purchase, without having the prior deeds. That the sale was not conducted in a way to produce the largest price; that it was imperfectly advertised, and no bill of particulars was affixed at the exterior of the premises, and that the proceedings at the sale were conducted as privately as possible. That Mr. *Papineau* became the purchaser of the premises in Boyle Street at the sum of 2500*l.*, which was much under their real value; and that he had not paid the deposit, or any part of the purchase money; that the bankrupt had never been out of possession of those premises, and was still in the occupation of them, and had since declared that the purchase was made for his benefit; that the whole of the proceedings had been carried on at the bankrupt's instance, and for his accommodation; and that the plan was to purchase the property at an under-value, with the intent of giving it back to the bankrupt. That the sale of the property at Dulwich was also conducted in a way most disadvantageous to the estate, and that a much larger sum ought to have been obtained for that property, which was sold to a Mr. *Anderton*, a friend of the bankrupt, though the purchase had since been declared to have been made for a Mrs. *Baxter*. And that the amount of the purchase money of the two properties far exceeded the amount of any lien of *W. M. Papineau*, though the contrary had been since alleged.

It appeared, that *Papineau* had since made an unsuccessful application to the Court of Queen's Bench for the delivery up to him of the deeds held by the petitioner.

The petitioner then alleged, that he was willing to

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offer 2800*l.* for the premises in Boyle Street, retaining on the purchase money such lien as he would be ultimately entitled to, after what should be found due to *W. M. Papineau* in respect of his lien on the two properties had been satisfied out of the proceeds of the sale of the premises at Dulwich, and the said sum of 2800*l.*

The prayer was, that the sale of the premises in Boyle Street might be rescinded, and put up again for sale, the petitioner undertaking on the terms before mentioned to bid for the same 2800*l.*; and that it might be referred to the registrar to approve of proper conditions of sale, and to inquire whether any and what proceedings should be taken touching the sale of the premises at Dulwich, with a view to the rescinding of the same or otherwise; and that the assignees and *Papineau* might be ordered to pay the costs of this application.

In answer to the allegations in the petition, the assignees deposed, that, having been informed that the petitioner had in his possession various deeds belonging to the bankrupt, they instructed their solicitor to summon him before the Commissioner, to be examined as to the lien claimed by him on such deeds, when he was accordingly examined with the full sanction of the Commissioner; that in so doing they had no desire to harass the petitioner, but that the examinations were made more frequent, and of longer duration, in consequence of the evasive answers of the petitioner. That it appeared from such examinations, that the petitioner had made an agreement with the bankrupt, by which the petitioner was to give the bankrupt half the profits of such business as the bankrupt should introduce to the petitioner to be transacted as his attorney and solicitor, and that in all cases the petitioner was to make out a full bill against

the bankrupt, and to allow him half the charges, after deducting the costs out of pocket. That in consideration of this agreement, the bankrupt was to share the profits earned by him as a conveyancer and annuity broker and scrivener. The assignees then alleged, that if the accounts between the bankrupt and the petitioner were to be adjusted upon the principle that the above agreement was illegal, the balance due from the petitioner to the bankrupt, instead of 7000*l.* then claimed by the bankrupt, would be upwards of 10,000*l.* That the bankrupt's property at Dulwich and in Boyle Street was sold for the best price that could be obtained for it, and for a fair and sufficient price; that great publicity was previously given as to the time and place of sale; and that the sale was numerously attended, and there was a spirited competition of bidders. They denied that the proceedings under the bankruptcy had been carried on under the direction or control of the bankrupt, or in any way to favour him; or that any such arrangement had been made with *Papineau*, as alleged in the petition, that he should become the purchaser of any part of the property. With respect to the conditions of sale, the assignees stated that they were prepared by their own solicitor, and not by the solicitor of *Papineau*, and that they were proper conditions, and in no way prejudiced the sale. That in October last they executed the conveyance of the property in Boyle Street to *Papineau*, and in February last the conveyance of the property at Dulwich to Mrs. *Baxter*, for whom it was bought by Mr. *Anderton*, as her agent, and who thereupon paid to the official assignee the balance of the purchase money. And that the petitioner had not proved any debt under the fiat, and was not, to the best of their belief, a creditor of the bankrupt.

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The solicitor for the assignees made an affidavit confirming their statement; and, in regard to the conditions of sale, he swore that they were usual and proper conditions, and did not contain any stipulation that a purchaser should not call for or require the production and possession of any of the deeds relating to the title of the property in question, or any other condition to deter people from becoming purchasers. He also stated, that he was in entire ignorance that the premises in Boyle Street had been purchased for Mr. *Papineau*, until the day after the sale, when Mr. *Papineau* wrote to apprise him of the fact; and that it was wholly untrue that Mr. *Papineau* paid no deposit in respect of the purchase, as the auctioneer who sold the property received of Mr. *Papineau's* agent at the sale a deposit of 450*l*.

The auctioneer who sold the property deposed, that some time previous to the sale he had 750 placards announcing the sale pasted up in the usual and most public situations in the metropolis, and in the neighbourhood of the premises both at Dulwich and in Boyle Street; and that in addition he inserted sixteen advertisements in the different metropolitan newspapers, and distributed 175 printed particulars and conditions of sale to persons applying for them; that he sold the property without reserve to the highest bidder in the presence of a large assemblage of persons, and knocked down the Dulwich property at the sum of 1250*l*., and the property in Boyle Street at 2250*l*., receiving the usual deposit; and that he had not the slightest knowledge that Mr. *Borradaile*, to whom the Boyle Street property was knocked down, was acting as the agent of Mr. *Papineau*; that there was a spirited competition among the persons present in bidding for the property, and that no objection

was offered to the title, or to any of the conditions of sale, which were proper conditions, and in no respect calculated to deter persons from becoming purchasers.

Mr. *Anderton*, a solicitor, also deposed to the publicity of the sale, and that he bought the property at Dulwich, *bonâ fide*, for Mrs. *Baxter*, who shortly after the sale took possession of it, and has continued in such possession ever since.

Mr. *Papineau*, the purchaser of the Boyle Street property, deposed, that in March 1839 he called at the petitioner's office, and, having acquainted him that he was about to advance the bankrupt 3000*l.*, desired the petitioner to prepare a good and valid security upon the two properties; upon which the petitioner prepared a bond and deed of equitable charge, which, after being executed by the bankrupt, were handed over to the deponent, to go with the indenture of assignment of the Dulwich property, and an indenture of release of the premises in Boyle Street. That it was untrue, as alleged in the petition, that the deponent was to have no security for his advance, except the bond and the possession of the two conveyances; but on the contrary, that it was expressly agreed between him and the bankrupt, and the petitioner was well aware of the fact, that the security was to be not only upon those two deeds, but also upon the properties therein respectively comprised, and that the deposit of those deeds was made for the purpose of having a regular mortgage prepared to the deponent for securing the 3000*l.* That he was not aware until after the bankruptcy, that the petitioner had in his possession or claimed any lien upon any deeds relating to the property, or he would not have advanced the money to the bankrupt. That it was untrue, as stated in the petition,

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that he caused the fiat to be issued at the instance of the bankrupt, or that he interfered in any manner relating to the sale of the property, or that he was a party to any such collusion in regard to the sale, as alleged in the petition. He then stated, that, the bankrupt being desirous of occupying the premises in Boyle Street, and having offered him an adequate rent for them, he agreed to grant the bankrupt a lease of them, when he should become competent to hold it; and that the bankrupt had since occupied those premises as his tenant; but that it was wholly untrue that there was any plan to purchase the property at an undervalue, with intent of giving it back to the bankrupt; that the deponent was the *bonâ fide* purchaser of the premises on his own account; and that, after allowing for the nett produce of the sales of the Dulwich and Boyle Street property, a balance was still due to the deponent from the bankrupt.

The bankrupt made an affidavit confirming the statements of Mr. *Papineau* and the other deponents in answer to the petition, and added, that, long prior to the time of his depositing in 1837 the two deeds relating to the Boyle Street and Dulwich property with Messrs. *Cocks*, he took away all the title deeds relating to the premises in Boyle Street from the petitioner. That it was expressly understood between himself and Mr. *Papineau*, that the latter was to have all the deeds relating to the property in Boyle Street and Dulwich for his security, and that he believed for some time that all the deeds had been accordingly given up to Mr. *Papineau*; the same having remained in the hands of the petitioner for convenience sake, and not on account of any admitted right of lien. And that if a correct account was taken of the transactions between himself and the petitioner, a

very large balance would be found due to him from the petitioner.

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The solicitor of the bankrupt also deposed, that he had carefully examined the accounts between the petitioner and the bankrupt, and that he was perfectly convinced that at the time of the bankruptcy, a large balance was due from the petitioner to the bankrupt. That in the examination of such accounts he discovered that the petitioner had withheld from the bankrupt the right to participate in considerable profits, and had likewise omitted to give him credit for large sums of money which had been received by the petitioner; and that, having stated these circumstances to the solicitor for the assignees, he decided upon summoning the petitioner before the Commissioners, for the purpose of explaining upon oath his accounts and dealings with the bankrupt. That the petitioner was subject to no vexatious proceedings before the Commissioner, but by his own evasive conduct he subjected himself to the animadversion of the Commissioner. And the deponent denied in specific terms all collusion in regard to the issuing of the fiat, and the sale.

Mr. *Swanston*, and Mr. *J. Russell*, in support of the petition. The petitioner in this case had a lien on the property, not in competition with that of *Papineau*, but in subordination to it. The assignees, it appears, were dissatisfied with the transaction between the bankrupt and the petitioner, and certain expedients were resorted to to defeat his lien. The conditions, on which the assignees offered the property for sale, could have no other effect than to impede the sale and depreciate the property. When the property was put up to sale, the highest bidding for it was *2250L.*; while the petitioner was ready to give

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2800*l.* for it, in discharge of his lien. One of the conditions of sale, which specified that the inspection of any other deeds than those in the possession of the assignees was to be obtained at the purchaser's expense,—and that all copies of deeds and documents, that might be required for the purpose of verifying the abstract, were also to be provided at his expense,—had the effect of throwing on the purchaser the burthen of satisfying *Columbine's* lien. The consequence of all this was, that *Papineau*, who was the petitioning creditor, purchased the property, and put the bankrupt into possession of it. That appears to be the grand and secret object of all these proceedings on the part of Mr. *Papineau* and the bankrupt.

Mr. *Bacon*, and Mr. *James*, for the assignees. The conduct of the assignees, which is now sought to be impeached by the petitioner, is not open to the slightest censure. It appears from the affidavits of the assignees, of *Davis* the auctioneer, and of the bankrupt, that the sale was an open one, and perfectly fair, and that a reasonable price was given for the property by *Papineau*; that *Columbine*, instead of being a creditor of the bankrupt, was actually indebted to him; and that the lien claimed by *Columbine* was disputed by the assignees and the bankrupt. The other side has shown no authority, that can justify the Court in setting aside a sale of property under these circumstances. The purchase money has been paid, the conveyance executed, and the purchaser is in possession; and there is no allegations in the petition of any larger sum having been offered on the part of *Columbine*. But the assignees contend that the petition ought to be dismissed upon another ground, namely, that the petitioner has no right to be heard in this Court.

Mr. *Anderdon*, and Mr. *Beales*, for *Papineau*. The petitioner could have no lien on this property, in respect of his possession of the deeds coming to his hands as they did under the circumstances stated in the petition. In *Stedman v. Webb* (a) and *Bozon v. Bolland* (b), the Lord Chancellor held that the lien of a solicitor on deeds in his possession was merely passive, and gave no interest in the land; and that, if an action of ejectment was brought by his client for the recovery of any property specified in the deeds, the solicitor could not refuse to produce them. [Sir *John Cross*. There is no evidence of fraud in the case; all I wish to be satisfied about is, whether the circumstance of the title deeds being in the possession of *Columbine*, and not being given up by him, did not prejudice the sale. *Papineau* was the only person at the sale, that knew the circumstances under which *Columbine* held the deeds; the other parties were quite in the dark about the matter; and therefore *Papineau* might have had an undue advantage over the other bidders at the sale.] The sale cannot be said to have been prejudiced, unless some person was deterred from bidding by the terms of the fourth condition of sale; and that nowhere appears. There is only one case in the books, that affords any authority for opening the biddings, after the purchase has been completed, and the purchaser let into possession; and Sir *Edward Sugden*, in his late edition of the Law of Vendors and Purchasers (c), adverts to the extreme inconvenience of opening biddings in bankruptcy. [Sir *John Cross*. This Court would never open the biddings merely for getting a better price; there can be no question about that. All

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(a) 4 My. & Cr. 346.

(b) 4 My. & Cr. 354.

(c) 10th ed. p. 93, 94.

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that the Court has to consider here is, whether there has been an irregularity in the execution of its former Order.] It has been decided, that the Court of Review has not jurisdiction to order a purchaser to complete the purchase of an estate, which has been sold under the common Order of the Court for the sale of an equitable mortgage; *Ex parte Cutts* (a). If the Court therefore cannot compel the specific performance of a purchase, it will not, *a fortiori*, set aside a sale. The decision in *Southby v. Hutt* (b) fully warrants the fourth condition of sale in the present case. In that case, it was held, that a purchaser was entitled to have a good title deduced and proved, either by the production of the deeds professed to be abstracted, or by such other evidence as would satisfactorily prove the statement in the abstract to be correct; and that such right was not affected by marginal notes, that certain deeds mentioned were not in the possession of the vendor.

Mr. *Swanston*, in reply. As to the alleged want of the *locus standi* of the petitioner in the matter of this petition, nothing more is wanting to justify the prayer in this case, than for any stranger to come and say that an assignee, the officer of the Court, has not done his duty. The petitioner here does not pray the Court to declare that he has an actual lien on this property, but that he may be declared the purchaser for the sum of £2800, subject to any lien he may have. There can be no doubt that any stranger might come and offer himself as a purchaser, and say that the former Order of the Court has not been duly executed. But we contend that he is, in

(a) 3 Mont. & A. 549, 3 Deac. 242.

(b) 2 Myl. & Cr. 207. And see *Dick v. Donald*, 1 Bli. N. S. 661.

fact, a creditor. He positively swears, and there is no proof to the contrary, that he is a creditor to the amount of £1000 and upwards, and that if certain accounts are gone into, his debt will be even still larger. When a party shows only the probability that he is a creditor, that is quite enough for the purpose of this petition. In *Tolson v. Score* (a) it was held by Lord *Eldon*, that, if a party alleges by his petition that he is a creditor, and shows by circumstances that he is so, supported by affidavit, that is sufficient to support a petition in bankruptcy. The case of *Ex parte Cutts* (b), which has been cited by the other side, will I hope undergo some revision; but that case does not apply to this, which relates merely to an improper execution of an Order of this Court; while that related only to the specific performance of a contract. As to *Southby v. Hutt* (c), the question there was, whether the fourth condition in that case to deliver an abstract and deduce a good title was contracted by the sixth condition, which stated that certain deeds were not in the possession of the vendor. The sixth condition in that case was something like the fourth condition in this; it did not exempt the vendor from producing the deeds, but only from delivering them.

Sir JOHN CROSS.—In the course of this discussion a doubt has been thrown out, as to the jurisdiction of this Court in entertaining the prayer of this petition. The jurisdiction of the Court is somewhat of an anomalous character. It has been supposed, from the name given to the Court by the legislature, that it is only a Court of

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(a) 12th December, 1826, from a MS. note of Mr. Barber.

(b) 3 Mont. & C. 549; 3 Deac. 242.

(c) 2 Myl. & Cr. 207.

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Appeal ; but the act of parliament under which it was created constitutes it a Court of original jurisdiction, and declares expressly that it "shall have superintendence and control in all matters of bankruptcy, and shall also have power, jurisdiction, and authority to hear and determine, order, and allow all such matters in bankruptcy, as now usually are, or lawfully may be brought by petition or otherwise before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy, or elsewhere." The complaint preferred by this petition is, that the Order of this Court has been scandalously abused. Now can any one doubt but that this Court has power to see to the due execution of its own Order? Mr. *Papineau* obtained, as mortgagee, an Order for the sale of this property ; and he now complains of a great abuse in the execution of the Order. The complaint affects the conduct of two sales ; and the petitioner comes here to ask, that the purchaser shall deliver up the property into which he has been let into possession, after permitting him to enjoy the property and act as the owner of it during a period of eight or nine months. If, however, all the allegations in the petition had been proved, I do not mean to say that such proof would not then have been sufficient to induce the Court to go as far as is proposed by the prayer of the petition. I must beg leave here, however, to deny what has been asserted in argument, namely, that a perfect stranger can come to this Court and petition in any matter of bankruptcy. This Court can only hear a party aggrieved. The question is, therefore, has the petitioner sustained a grievance. In the first place, he must show that he is a creditor, or that he has a lien on the estate, and that the property has been sold to a disadvantage. My impression is, first,

that he is not a creditor ; but I suffered the proceedings to go on, in order that all parties inculpated might have an opportunity of answering the charges against them. Then, if he had a right of lien, why did he not attend the sale, and claim his lien ? If the property fetched less than was now offered to be given, it was because he held back the title deeds, when, if he had chosen, he could have attended the sale on his own behalf, and objected to the disposal of the property under disadvantage. If he is prejudiced by the sale, therefore, this is by his own voluntary act, and he has no right to complain. The petitioner states, that it was privately arranged between Mr. *Papineau* and the bankrupt that the property should be put up to sale ; and that although a marketable title could not be made, yet that Mr. *Papineau* should become the purchaser of the property at an undervalue. This is the first charge of collusion preferred against Mr. *Papineau* and the assignees. That the bankrupt is now in possession of the property, and so far has been favoured by Mr. *Papineau*, is no doubt the fact ; and this led me to examine carefully all the allegations in the petition ; because that circumstance, of course, gives a colour to those charges. But it appears to me, that the charge of collusion is completely disproved by every party who was concerned in the sale. Every thing was done publicly to insure competition, and in the ordinary way. It is then alleged, that *Papineau* made no deposit of any part of the purchase money. Why, it is proved that he actually made a deposit of £450. This allegation therefore appears to be untrue. The next allegation is, that the bankrupt was never out of possession of this property,—that the fiat was concerted for the benefit of the bankrupt,—and that the sale of the property was part of

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the scheme. This allegation is disproved by the affidavits in behalf of the respondents. It is next alleged, that the sale of the property at Dulwich was also conducted in a most disadvantageous way, and that it was sold to a Mr. *Anderton*, a friend of the bankrupt, for a lower price than ought to have been obtained for it. But Mr. *Anderton* swears that he had no communication with the bankrupt about the sale of this property, and that he was sent there expressly by Mrs. *Baxter* to purchase the property for her. There is no foundation therefore for this charge in the petition. I do not impute wilful falsehood to the petitioner, but he has been singularly incautious in making these allegations. As to the offer of the petitioner to give £2800 for the property in Boyle Street, subject to his lien, this might leave the estate for an uncertain time wholly unprofitable to the bankrupt's creditors; for its value would depend upon the chance, whether, or not, the petitioner would be able to establish his lien. The grounds on which I must decline making any Order on this petition are, 1st, that I am not satisfied that the petitioner is a creditor; and 2ndly, that if he is a creditor, he is not a party aggrieved. It is not distinctly stated, how these deeds first got into the possession of the petitioner. But this is quite clear, that the two principal deeds conveying the property to the bankrupt were in the hands of *Cox* and *Biddulph*, who handed over those deeds to Mr. *Papineau* upon his satisfying their claim. The petitioner is then applied to, to prepare a mortgage of the property to *Papineau*; when he tells him that he will prepare a security as good by way of equitable mortgage; and he retains the possession of these deeds, without the knowledge of *Papineau*. In disposing of this petition, it is unnecessary for me to give any opinion,

whether, or not, a solicitor who has a lien on title deeds has any interest in the estate. The petition must be dismissed; and as the petitioner has had the courage to call on the Court to make the assignees pay his costs, it is but just that he should pay theirs, on failure of his attempt.

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Petition dismissed, with costs.

Ex parte SARAH RHODES.—In the matter of
JAMES WOOD.—

Westminster,
April 27.

THIS was a petition of a sister of the bankrupt to annul the fiat, which was issued on the 15th July last; the alleged act of bankruptcy being a departure of the realm, and being out of the realm and remaining abroad, with intent to delay his creditors. The petitioner had made an affidavit in support of the petition, stating, that in the year 1838 the bankrupt went to New York, for the purpose of his business, and still remained there for the same purpose, and that he had no intention to delay his creditors. A clerk of the bankrupt had also made an affidavit to the same effect, stating that the bankrupt had during his stay in America purchased large quantities of goods and transmitted various property to England, by which assets to a considerable amount had fallen into the hands of his assignees. The bankrupt, however, had made no affidavit himself as to his intention in going abroad.

The Court will not entertain a petition of a relative of the bankrupt to annul the fiat, on the alleged ground that his remaining abroad was without any intention to delay his creditors; when the petition is presented without the bankrupt's privity, and he himself makes no affidavit on the subject.

Mr. *Swanston*, and Mr. *Elmslie*, in support of the petition, submitted that the question was one entirely of

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fact, whether the intention of the bankrupt in leaving this country and remaining abroad was with intent to delay his creditors; and that this intention was sufficiently negatived by the affidavits.

Mr. *J. Russell*, for the petitioning creditor, and Mr. *Walker*, for the assignees, were stopped by the Court.

Sir JOHN CROSS.—This is not the petition of the bankrupt, nor alleged to be with his privity or assent; neither does it appear that any notice has been given to him of the intention to present it, in order to afford him an opportunity of supporting or opposing it. The petition is a mere voluntary act of a relative, who takes upon herself to deny any intention on the part of the bankrupt to delay his creditors. The Court can only judge of the bankrupt's intention from the facts of the case. Here are creditors who have no redress for the recovery of any portion of their debts, except by means of a fiat, which is accordingly issued against the bankrupt; and now, after an acquiescence of the bankrupt for no less a period than three years, a stranger comes and applies to the Court to annul the fiat. The Court cannot listen to such an application, and is by no means satisfied that there was no intention to delay his creditors; on the contrary, the inclination of the opinion of the Court is, that the bankrupt is now staying abroad for that express purpose.

Petition dismissed, with costs.

Ex parte JAMES ROBERT SPILLER.—In the matter
of THOMAS ROBERT WATERS.—

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*Westminster,
April 30.*

THIS was the petition of the Northamptonshire Banking Company, by their public officer, for the proof of a debt, and for a new choice of assignees.

The petition stated, that the fiat issued on the 1st of March last, and that the debts already proved did not amount to more than the sum of 1900*l.*, and that the total amount of just debts due from the bankrupt to his creditors beyond those proved, and over and above what was due to the Northamptonshire Banking Company, did not exceed the sum of 2000*l.* That the bankrupt was indebted to the banking company in the sum of 4900*l.*, on the balance of his banking account with them; and that the petitioner obtained, as the registered public officer of the banking company, two judgments against the bankrupt in the Court of Exchequer, under which there was due to the banking company for debts and costs upon such judgments the sum of 4907*l.* That the petitioner attended an adjourned meeting for the choice of assignees at Northampton on the 2nd April instant, and tendered a proof of debt on behalf of the banking company against the bankrupt's estate for the sum of 4907*l.*, producing to the Commissioners, in support of such debt, the judgment papers stamped with the office seal of the Court of Exchequer, and indorsed for the several sums of 2903*l.* 10*s.* and 2003*l.* 10*s.*, making together the sum of 4907*l.*; but the Commissioners rejected the proof, because the petitioner did not produce to them office copies of the two judgments. That the petitioner then agreed to abandon the judgments, and to waive so much of the debt as was due for costs, or

Where the amount of a creditor's debt, which would have turned the choice of assignees, was not disputed on his application to prove it before the Commissioners, but the proof was opposed by the solicitor who issued the fiat, on an invalid objection, which induced the Commissioners to reject the proof; and they refused to adjourn the choice for a reasonable time, to enable the creditor to produce an unnecessary document, the production of which was insisted upon by the Commissioners; and the whole proceeding appeared to be a stratagem of the solicitor to hurry on the choice of assignees, and prevent the creditor from voting in such choice; a new choice was directed.

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otherwise, in respect of the judgments, and to prove for the sum of 4552*l.* 9*s.* 8*d.*, to which sum the debt due from the bankrupt was then reduced by the realization of different bills of exchange, which had arrived at maturity and had been paid since the signing of the judgments, in order that the petitioner might vote for the choice of assignees; but the Commissioners still refused to admit the proof, on the ground of the non-production of office copies of the judgments, although the proof was not disputed or opposed by any of the creditors then present. That the petitioner then stated to the Commissioners that the office copies of the judgments had been written for, and were expected to be brought within the space of one or two hours; and he therefore prayed an adjournment for that length of time, and offered to pay any costs or expenses which might be incurred by reason of such adjournment for his accommodation; but that this request was refused by the Commissioners, and the business of the choice proceeded and was not completed till past five o'clock; shortly after which time the office copies of the judgments actually arrived, and were ready to be produced before six o'clock. That the debts proved by the respective creditors of the bankrupt, who voted in the choice of assignees, did not exceed in amount the sum of 1400*l.*

The prayer was, that the Commissioners should hold a meeting, in order that the petitioner might prove for the sum of 4552*l.* 9*s.* 8*d.*, and that the choice of assignees already made might be set aside, and a meeting held for a new choice; and that the present assignees might be directed to deliver to the new assignees such part of the estate and effects of the bankrupt, as should appear to be in their hands remaining in specie, together

with all books, papers and writing in their custody or power, belonging or in anywise relating to the bankrupt's estate and effects; and that they might be ordered to come to an account before the Commissioners for what had come to their respective hands.

In opposition to the prayer of the petition, it was sworn by the solicitor who issued the fiat, that the act of bankruptcy on which it was founded was committed by the bankrupt on the 16th of February last, and was a departure of the bankrupt from his dwelling-house, and absenting himself, with intent to delay his creditors. That about half an hour before one o'clock in the morning of that day the bankrupt executed to the petitioner, as the registered public officer of the Northamptonshire Banking Company, at the office of the company's solicitor at Northampton, two warrants of attorney for confessing judgment against the bankrupt at the suit of the petitioner, as such public officer, for the sums of 2900*l.* and 2000*l.* respectively. That on the same day judgments were signed and executions issued and levies made under such warrants of attorney, and that the whole of the stock, crops and implements on two farms in the occupation of the bankrupt, and his household furniture and stock in trade at his residence at the White Horse Tavern in Towcester, in the county of Northampton, were seized by the sheriff of Northampton, and certain other goods of the bankrupt at Birmingham were also at a subsequent period seized by the sheriff of Warwick. That the property so seized constituted the whole tangible property of the bankrupt. That claims having been made to this property by Messrs. *Wolston* and *Higgins*, and other parties, claiming under bills of sale previously given to them by the bankrupt, the sheriff

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procured summonses under the Interpleader Act for the attendance of all parties before a judge; who ordered that *Wolston* and *Higgins* should within a week bring into Court the sum of 2000*l.*, and that thereupon the stock, &c. on the farms should be re-delivered to them, and the sheriff discharged as to such stock, &c.; that the sheriff should sell the residue of the property seized, and bring the proceeds into Court, keeping a separate account of the sums produced by the sale of the goods in each claim; and that the sheriff should deliver to the execution creditors an inventory of the goods re-delivered to *Wolston* and *Higgins*. That, in pursuance of this order, the sum of 2000*l.* had been paid by *Wolston* into the Court of Exchequer; that the other property had been sold by the sheriff, and the produce thereof, amounting to nearly 1700*l.*, had also been paid into the Court of Exchequer, pursuant to such order; and that the said property seized by the sheriff of Warwick was still in his hands. That the deponent, as solicitor to the petitioning creditor, convened two private meetings on the 23rd and 24th of March before the Commissioners, for the express purpose of investigating the claim of the banking company, and examining into the validity of the warrants of attorney and executions; and that at such meetings several witnesses were examined, with a view of invalidating such executions; and the petitioner was also duly summoned to attend and to produce all banking and other books of account containing any entries of or concerning any of the bankrupt's dealings and transactions, and all papers and other documents in any manner relating to the bankrupt, especially all checks, bills, and other securities received from the bankrupt, or on his account, by the banking

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company. That the petitioner attended both such meetings, but refused either to produce any books or documents, as required by the summons; that the deponent put to the petitioner several questions relating to the warrants of attorney, and the claim of the banking company, but the petitioner refused to answer any such questions; and the Commissioners thereupon decided that the deponent was not entitled to press the same, as the petitioner was a privileged witness. That the solicitor to the banking company was also summoned before the Commissioners for examination, but that he likewise declined to answer questions put to him by the deponent. That at the meeting of the 2nd April, neither the petitioner, nor his attorney, produced any documents or writings whatsoever in support of their right to prove the alleged debt, except two papers on which the *incipitur* of the proceedings was entered for production to the master at the time of signing judgment; nor did they make any re-delivery of the property taken in execution, but merely offered in general terms to give an undertaking to do whatever might be requisite to vacate their securities. That the Commissioners rejected the proof, upon the evidence before them; and also declined to adjourn the meeting, on the ground that several creditors, who had proved debts of large amount and who resided at a considerable distance from the place of meeting, had objected to such adjournment and stated their inability to attend any further adjournment. That the Commissioners expressly stated, as a ground for rejecting the proof, not only that the petitioner had not produced before them office copies of the judgments, but also that the banking company insisted on the validity of the executions, and had not vacated their

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securities, or re-delivered the property seized, and that the petitioner had refused to answer the questions put to him by the deponent, or to produce the banking books and other documents. That the deponent was present during the whole of the meeting, and he denied that the petitioner, or his solicitor on his behalf, stated to the Commissioners or to the deponent, that the banking company had waived, or intended to waive, the proof for the costs on the judgments. That one of the assignees chosen at the meeting had proved a debt of 261*l.* 3*s.* 11*d.*, and the other a debt of 327*l.* 17*s.* 4½*d.*, neither of whom held any securities on any property of the bankrupt; and the memorandum of such choice was signed by seventeen creditors out of twenty, who had proved debts to the amount of 10*l.* and upwards, and whose debts in the aggregate amounted to 1844*l.* 11*s.* 7½*d.*, out of 1894*l.* 14*s.* 3½*d.*, being the total amount of debts proved of 10*l.* and upwards. Lastly, that in consequence of the bankrupt's estate having been principally converted into cash, and paid into Court under the above mentioned interpleader order, the greater part of the business relating to the bankruptcy must necessarily be carried on in London, where one of the assignees, and the deponent, who acted as solicitor to the assignees, were resident, and where it was expedient, for the benefit of the bankrupt's estate, that one of the assignees, at least, should be a resident, and where the several issues arising out of the interpleader order would be tried.

The statements contained in this affidavit were confirmed by those of three other deponents, who were present at the meeting of the 2d April.

In reply to these affidavits, the solicitor to the banking company deposed:—That he attended the adjourned

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meeting for the choice of assignees as solicitor for the banking company, who had come to the determination of giving up their priority as execution creditors, in order to come in as creditors without insisting on their judgment debts, and to prove for their balance of the general banking account. That, in consequence of such determination, and in order to save time and trouble to the solicitor to the fiat, deponent prepared a deposition for the balance which was then ascertained to be due from the bankrupt to the banking company; and, that in order to exhibit all securities which the company might hold, the deponent wrote to his London agents to send down the necessary judgment papers for proving the debt. That his agents applied at the proper office for office copies of the judgments, but, not being able to procure them in time for the adjourned meeting, they forwarded the original judgment paper with the office seals thereon, comprising the full entry of the proceedings from which the rolls were carried in, and not merely the incipitur of such judgments. That in the deposition tendered for proof were set forth the usual particulars of the several bills of exchange held by the company as collateral securities, and the same was handed to the Commissioners, who appeared to read the same, but did not then raise any objection either to the amount tendered to be proved, or to the form of proof. That the solicitor to the fiat did not raise any objection to the amount of debt claimed, but merely urged that Mr. *Spiller*, the manager of the banking company, had refused at a former private meeting to be examined as to the amount. It was alleged, however, by the deponent, that at such private meeting Mr. *Spiller* answered all such questions as the Commissioners considered he was

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bound to answer, and that at the adjourned meeting for the choice of assignees no attempt was made by the Commissioners, or any other person, to dispute or to examine into the account claimed to be proved on account of the banking company, nor was there any objection made to the amount of such proof; but that the solicitor to the petitioning creditor, knowing that the proof of the banking company would carry the choice of assignees, with a view to prevent such proof being made, took and relied solely upon the objection as to the non-production of the copies of the judgments, in order thereby, if such objection prevailed, to carry the choice of assignees unfairly and improperly, as against the banking company, by excluding them from their right to prove and vote in such choice. That when the deponent first tendered the proof of the banking company, the parcel had not arrived from his agents with the judgment papers; but that Mr. *Spiller* had in his possession all the bills, vouchers, checks, securities, and the copy of the banking account. That one of the Commissioners then observed, "Oh, but you have a judgment and warrant of attorney—you must give up the warrant of attorney, in order that it may be exhibited." That deponent replied, "We do'nt prove on the judgments; we prove upon the original banking account, and wave the judgments." The Commissioners then inquired, "Have you entered satisfaction on the roll?" to which deponent said, "No such thing was ever heard of." That deponent then, on behalf of the banking company, offered, if the Commissioners did not consider that the proof would not be virtually an abandonment of their judgments and executions, to sign any document which was necessary to abandon the judgment securities; but,

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before the Commissioners had come to any decision as to admitting the proof, a parcel arrived from the deponent's London agents containing the original judgment papers, which were then handed to the Commissioners by the deponent, and were proposed to be added to the deposition and exhibited, if the Commissioners thought it necessary ; the deponent at the same time stating to the Commissioners, that the proof tendered was for less than the judgment, and that no costs were included in the proof, which was not in respect of damages recovered on a verdict. That the deponent stated to the Commissioners, that he could not produce the warrants of attorney, because they were filed as of course in the proper office ; but that, knowing that office copies of the judgments would arrive from his agents about half past five on that same day, the deponent proposed, in case the Commissioners insisted on the production of such office copies, that the meeting should be adjourned for an hour or two, it then being about half past four or a quarter to five o'clock, and the deponent offered to pay any extra expense which might be incurred by a compliance with this request ; but the Commissioners rejected this offer. That no proposition was made by the Commissioners, or the solicitor to the fiat, or any other person, to examine Mr. *Spiller* as to the debt so claimed to be due to the banking company, although he was then ready and willing to be examined ; nor was there any the slightest objection made to the account, or the amount claimed to be proved. That the choice of assignees was not completed till half past five o'clock, and that the parcel arrived in Northampton with the office copies of the judgments about half past five. That, in pursuance of the judge's order made on the 25th February last, the

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sheriff had sold the effects of the bankrupt taken in execution, and paid the produce into Court; and that neither the deponent, nor his said clients, nor any person for their use, had received any money or possessed themselves of any effects of the bankrupt under such execution.

Mr. *James Russell*, and Mr. *Wright*, in support of the petition. The petitioners in this case claimed to prove on the bills of exchange and the balance of the banking account, and not on the judgments; they were not bound therefore to produce the office copies of the judgments; and the Commissioners ought to have admitted the proof, which would have carried the choice of assignees. When the proof of a debt has been improperly rejected by the Commissioners, which would have carried the choice of assignees, the Court has on many occasions directed a new choice. The authorities, though somewhat contradictory, are in favour of such a proceeding. The first case to be met with in the books on this subject is *Ex parte Gregnier (a)*, in which Lord *Hardwicke* said, that he could not lay it down as a rule, that, because some of the creditors are abroad and beyond sea, they must at all events have an opportunity of voting in the choice of assignees, and that a new choice must for this cause alone be directed. But that is a very different case from this, where a creditor has been improperly prevented from proving his debt to vote in the choice of assignees. *Ex parte Butterfill (b)* may perhaps be cited on the other side, where Lord *Eldon* said, that the appointment of assignees would not be disturbed, when chosen by those who can make immediate proof; although those, who may not have been

(a) 1 Atk. 91.

(b) 1 Rose, 192.

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prepared so to do, would have turned the scale. The facts of that case, however, are very distinguishable from those of the present. There, the bankrupt swore that he owed the creditor nothing, and the creditor positively refused to be examined as to the amount of his debt. Here the amount of the debt was not disputed, and the creditor was willing to be examined. *Ex parte Durent* (a), and *Ex parte Thompson* (b), may also be relied on by the respondents; but none of the facts of those cases are given in the report, nor does it appear on what grounds the Commissioners rejected the proof. In each of those cases, however, it was admitted by the Vice-Chancellor, that if the proof was fraudulently or improperly procured to be rejected, with a view to influence the choice of assignees, in such case there would be a ground for directing a new choice. And in the subsequent case of *Ex parte De Chapeaurouge* (c), which was first decided by the Vice-Chancellor, and afterwards confirmed by the Lord Chancellor on appeal, it was held, that where, at the election of assignees, the major part in value of the creditors had been, accidentally and without default on their parts, excluded from voting, a new choice of assignees ought to be directed. *Ex parte Milner* (d), which occurred in this Court, may likewise be cited against the prayer of this petition; but in that case, Sir John Cross, who differed from the rest of the Court, said, "if the proof (of the creditor seeking to set aside the choice of assignees) were rejected on a reasonable objection, I admit then it would not perhaps be fair to open the choice. But the objection taken on the present occasion was not only erroneous, but was cap-

(a) Buck, 201.

(b) *Ibid.* note (a).

(c) Mont. & M. 174.

(d) 3 Deac. & C. 235.

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tious in the extreme ; it was upon a mere matter of form, namely, because the affidavit in proof of the debt was sworn before the solicitor to the commission, the very person who would be most interested in seeing that the proof was right. The Commissioners, though they saw the great injustice that would be done by precluding parties from their right of voting, and although they might have adjourned the choice till the next meeting, so as to have enabled the petitioner to set right that which they only regarded as an error in form, refuse nevertheless to adjourn the meeting, and suffer the election to proceed ; although little, if any, injury to the estate could have happened by this short delay. However desirable it may be to follow precedents, I think we ought not to do so, when it would work a manifest injustice. That it was in our discretion to direct a new choice on this occasion, is admitted on all hands ; and, being thus called on to do an act of justice to this petitioner, my impression is, that if we refuse the prayer of this petition, we shall be really doing him a great injustice." This reasoning applies very strongly to the present case. The decision in *Ex parte Edwards* (a), however, appears to be a complete authority in support of this petition. It was there held, that where the Commissioners had improperly rejected the petitioner's proof to a very large amount, whereby two creditors for comparatively trifling sums were enabled to choose the assignees, a new choice ought to be directed, the petitioner indemnifying the estate against all the costs. And the same doctrine was held by the Lord Chancellor, in *Ex parte Hawkins* (b), namely, that where, through the error of the Commissioners, the great body of the cre-

(a) Buck, 411.

(b) Buck, 520.

ditors were prevented from proving their debts, and voting in the choice of assignees, there should be a new choice. In *Ex parte Danby (a)*, also, where the assignees had been elected by the vote of the petitioning creditor before he had proved, it was held that the choice might be vacated, even though the petition was presented six months after the election. On these grounds, therefore, and more especially for the reasons expressed by Sir John Cross in *Ex parte Milner*, which apply so peculiarly to the facts of the present case, we submit that there ought to be a new choice of assignees; as there has been no default of the petitioners, and they have been improperly shut out from voting in the choice.

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Mr *Swanston*, and Mr. *Prior*, for the assignees. The case of *Ex parte Danby (a)* does not apply to this; for there the Commissioners admitted the vote of a party, who had not proved his debt under the commission; and the Vice-Chancellor said, that it was not a choice, in the mode prescribed by the statute. The choice therefore in that case was contrary to law. All the cases lay down this principle, that where there has been a substantial *bonâ fide* choice, it ought not to be disturbed; and that the mere rejection of the proof of a creditor is not, of itself, a sufficient cause for directing a new choice, even though such rejection proceeds from an error in judgment of the Commissioners. It is only where creditors are kept back *by fraud* from voting in the choice of assignees, that the Court will attend to an application for a new choice. In *Ex parte Surtees (b)*, Lord *Erskine* says: "It is properly admitted in this case, that the circumstance that some creditors, whose votes would have turned the scale,

(a) Mont. 67.

(b) 12 Ves. 10.

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were absent by accident, is not sufficient. But if creditors were kept back by fraud, assignees chosen under such circumstances should be set aside, and a new choice should be made. This, however, is not a case, in which it is possible to take that into consideration; for these petitioners unquestionably could not be in a condition to prove, being prevented, not by fraud, but by the nature of their debts, coupled with the securities they held." The case of *Ex parte Durent* (a) is an express authority, that assignees are not to be removed, because Commissioners improperly reject a proof; unless it appear that the proof was fraudulently procured to be rejected, with a view to influence the choice of assignees. In *Ex parte Edwards* (b), which has been relied on by the other side, the Vice-Chancellor said that the facts of that case were very special; there were only three creditors, the petitioner for £10,000, and two others, both of whose debts only amounted to £172; and the petitioner, through the error of the Commissioners, who mistakingly rejected a power of attorney, was prevented from voting. In that case, therefore, two creditors for comparatively trifling sums were enabled to choose the assignees, while a creditor for £10,000 was improperly excluded from voting in the choice. Here the great body of the creditors are not excluded, but seventeen creditors out of twenty, whose debts amounted to £1844 out of £1894, were the persons who chose the assignees. It was therefore a *bonâ fide* substantial choice. In *Ex parte Milner* (c), Sir George Rose said: "There is no case in which assignees already chosen have been removed, merely on the ground that the proofs of creditors have been rejected, because

(a) Buck, 201.

(b) Buck, 411.

(c) 3 Deac. & C. 241.

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they were tendered in an informal shape, and that the assignees have in consequence been chosen by those creditors who were properly prepared to prove their debts. The practice has been hitherto established against opening the choice, for this cause alone. If the petitioner had even tendered evidence of the consideration for the debt to the Commissioners, and they had rejected the proof, and had proceeded in the choice of assignees, the practice for twenty years has established that the Court would not on that ground alone have opened the proof. If then such would have been the practice, where the right of the creditor to prove his debt was positively rejected,—*a fortiori*, if the rejection of the evidence of the debt is the only cause for complaint, there is still less reason for opening the choice.” In the present case, the petitioner refused to answer any questions relating to the warrants of attorney, and the claim of the banking company. He refused also the production of the banking books, not of the deeds, but of the accounts between himself and the bankrupt. Can the petitioner then complain of the conduct of the Commissioners in insisting on the production of the office copies of the judgments? In *Cooke's Bankrupt Laws*(a), it is said: “If the creditor has a judgment, it should seem that he ought to produce an office copy of the judgment to be exhibited; for, upon a petition to have the proof of a debt admitted, which the Commissioners had rejected because the creditor had not an office copy of the judgment to exhibit, the petition was dismissed with costs (b). The rejection therefore of the petitioner's proof in this case was fully justified, from his not being prepared with sufficient evidence to establish it. But the

(a) 1 C. B. L. 129.

(b) *Ex parte Concannon, ib.*

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decision in *Ex parte Frith* (a) shews, that the bankrupt here ought to have been discharged from the judgment, and all benefit from it relinquished, before the proof could have been admitted on the proceedings.

Mr. *J. Russell* was not called on to reply.

Sir JOHN CROSS.—There is only one rule I know of for the Court dealing with a question of this nature, and that is to be found in the act of parliament; which gives a discretionary power to the Lord Chancellor, upon petition, to order any assignment made to the assignees of a bankrupt to be vacated. It is no doubt very convenient on many occasions, to lay down certain rules for the government of the Court; but it not unfrequently happens, that rules laid down to fetter the discretion of the Court defeat the justice of the case. In the present case, it appears that the banking company had an undisputed debt of £4500 and upwards owing to them from the bankrupt on the balance of his banking account, to secure which they obtained two judgments on two warrants of attorney given by the bankrupt. The petitioner, as the public officer of the company, was required, it seems, to produce the banking books of the company before the Commissioners; but it is not very likely that it was in his power to produce them. At the adjourned meeting, on the 2nd April, the petitioner attended before the Commissioners to prove the debt due from the bankrupt to the banking company; when the solicitor, who had the custody of the proceedings, objected to the proof being admitted, unless the office copies of the judgments were produced. The petitioner then said, that

(a) 1 G. & J. 165.

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he would abandon the judgments, and prove merely for the balance of the original banking account. To this proposition the solicitor also objected, still insisting that the office copies of the judgments must be produced. Why did he persevere in this objection? The amount of the debt was not disputed; there was no suggestion of any fraud or error in the statement of the balance; and yet he still opposes the right of the banking company to prove, or for the choice of assignees to be adjourned, because the petitioner did not produce office copies of those judgments which he offered to abandon, and which he was therefore not bound to produce. It is clear to my mind, that the sole object of the solicitor in resisting this proof was, that he might be retained as solicitor to the fiat, knowing that the banking company, whose debt would carry the choice of assignees, employed another solicitor. The Commissioners suffered the objection of the solicitor to prevail, and refused to admit the proof; they refused also to wait a reasonable time for the production of the office copies of the judgments, which were expected to arrive from London, and which in fact did arrive within an hour after the assignees were chosen. It is quite plain, that the whole opposition of the solicitor was not a *bonâ fide* objection to the debt, but a mere stratagem to hurry on the choice of assignees, and to exclude the petitioner from voting in such choice. All that is necessary for me to say on this petition is, that the assignees have not been fairly chosen, and there must consequently be a new choice. A proceeding of this kind is not attended with the same inconvenience, as it was before the alteration of the law of bankruptcy; for now there is no necessity for a new assignment after a fresh choice of assignees, the memorandum itself of their ap-

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pointment having the effect of absolutely vesting in them the estate of the bankrupt, without any fresh deed of assignment being executed for that purpose (a).

(a) See 1 & 2 W. 4. c. 56. s. 25.

Ex parte JOSEPH OAKES.—In the matter of
JOSEPH OAKES.

Westminster,
April 30.

On a petition by the bankrupt for the removal of one of two assignees, where it appeared that he was a mere instrument in the hands of the other assignee, and that the petition was got up between them in collusion, and out of a spirit of hostile opposition to the assignee against whom it was presented, the petition was dismissed.

Seemle, that a bankrupt may petition for the removal of an assignee, although his estate may not be expected to produce a surplus.

THIS was a petition of the bankrupt to remove one of the assignees, on the ground of improper conduct imputed to him in the administration of the estate. The proceedings under the fiat had been impounded, under an Order of the Court made on the hearing of two former petitions (b) in the same bankruptcy; one of which was presented by the assignee, whose removal was now sought for, praying for an Order on the solicitor to deliver up the proceedings; and the other petition was from the other assignee, *R. Beech*, praying for the removal of the same assignee against whom the present petition was now presented by the bankrupt. On the first of these petitions the Order was made for impounding the proceedings, and the other was dismissed with costs. The facts of the case appear in the former report. The only question of importance arising out of the present proceeding was, whether a bankrupt, whose estate was not expected to produce a surplus, could petition for the removal of an assignee.

Mr. *Swanston*, in support of the petition. In consequence of the proceedings under the fiat being still impounded, the estate cannot be properly administered,

(a) See *Ex parte Randall*, and *Ex parte Beech*, ante, vol. i., 562.

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and the bankrupt and his family are in want. Although the bankrupt's estate is not likely to produce a surplus, he has nevertheless a material interest in the due administration of it by the assignees, and that it should produce the most that can be made of it; as the amount of his allowance will depend upon the amount divided among his creditors, and the obtaining his certificate will probably depend also on the same contingency. With respect to the right of a bankrupt to interfere in the choice of assignees, Lord Eldon, in *Ex parte Shaw* (a), says, in allusion to such interference, "is it quite clear, that it is a wholesome principle, which intends that the person who has the most accurate knowledge of the state of his affairs, how he became a bankrupt, by what means his fortune may be retrievable, and by what method his estate may be best collected for the benefit of his creditors, (*even without yielding him any surplus*, or doing so) must shut his mouth; or that he is to say, I cannot advise any of you to chose the person who I think would be the best assignee? and yet the person he would recommend might be the only proper person to administer his affairs." These observations are very strong in favour of the interest of the bankrupt, as well in the appointment, as in the continuance of particular persons as his assignees. And the right of the bankrupt to petition for the removal of an assignee appears from the result of an inquiry, that took place during the progress of the discussion of *Ex parte Shaw*; for it is stated (b), that upon the search made in the bankrupt office for instances of the interference of bankrupts in the administration of the commission, no less than four cases were found, in which the bankrupt had petitioned either for the removal of assign-

(a) 1 G. & J. 154.

(b) 1 G. & J. 158, note (a).

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nees, or complaining of their conduct in the mal-administration of his estate, and in all of which petitions Orders had been made in favour of the bankrupt (a).

Mr. *Price* appeared for *Beech*, the other assignee, also in support of the petition.

Mr. *Kenyon Parker* for *Randall*, the respondent assignee, stated that many of the allegations contained in this petition were founded in falsehood, and that the petition was not sanctioned by any of the creditors. He contended, also, that a bankrupt, whose estate would not produce a surplus, had not a sufficient interest to support a petition for the removal of an assignee.

Mr. *Swanston*, in reply. Whether the bankrupt's estate is likely to produce a surplus, or not, he has a right to apply to the Court, that his estate may be duly administered. The cases already referred to, in the note (b) to *Ex parte Shaw*, show clearly that he has such right. In *Ex parte Hedges* (b), the first of the cases mentioned in the note, the bankrupt and other persons petitioned, stating that the petitioners had made inquiries into the character and circumstances of the assignee, and found him unfit for the trust, and praying that he might be discharged, or that one *Richardson* might be joined with him as assignee; and the Order was, that the Commissioners should proceed to a new choice. Another of these cases, *Ex parte Langford* (c), was also the petition of the bankrupt, which stated that his assignees had

(a) See also *Ex parte Jackson*, G. Cooper, 286, cit. in *Ex parte Shaw*, 1 G. & J. 144, note (a).

(b) 1 G. & J. 158.

(c) 1 G. & J. 158, note.

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possessed themselves of his goods to a considerable amount, and had kept the same eight or nine months packed up after the same were appraised, before disposing thereof, whereby they suffered great damage, and that the same were sold at prices much below their value; that the assignees had possessed themselves of the petitioner's real estate, but had not sold the same, though they had been offered the full value thereof; and that by such dilatory proceedings of the assignees, the petitioner's allowance would be greatly diminished; and prayed that the assignees might be ordered to account before the Commissioners, and that the petitioner's estates might be forthwith sold, and that the assignees might be directed to balance accounts with the petitioner, and that the produce of the petitioner's real and personal estate might be forthwith distributed;—and the Order was made as prayed. So in *Ex parte Jackson* (a) the bankrupt himself presented a petition, praying the removal of the assignees, and a new choice; on which it was ordered that the Commissioners should call a meeting of the creditors by advertisement in the usual manner, in order that the creditors who should be present might, if they thought fit, determine to proceed to a choice of new assignees in the place of the then assignees, and if at such meeting the creditors should so determine, it was ordered that they should proceed to such new choice accordingly. These authorities are quite sufficient to establish the right of the bankrupt to present this petition.

Sir JOHN CROSS.—It appears to me, that this application is got up by the other assignee, *Beech*, in collusion

(a) G. Cooper 286; 1 G. & J. 144, note (a).

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with the bankrupt, for the purpose of harassing the assignee against whom the petition is presented; and that the bankrupt was made a party to the petition, as he would not be liable to costs. One of these assignees is adverse to the bankrupt, and favourable to the creditors; the other is favourable to the bankrupt, without much apparent feeling for the interests of the creditors. The only thing, that, as it strikes me, would be beneficial to the creditors in this state of circumstances, is, that there should be a new assignee appointed in the room of *Beech*, the petitioner. Since the Court impounded the proceedings on the hearing of the former petition, it appears that *Randall* went to *Beech* to ask him to agree to appoint some other solicitor; but that *Beech* refused to do so, notwithstanding the opinion which the Court expressed on the former occasion as to the conduct of this very solicitor, and which induced the Court to order him to deliver up the proceedings. Under all the circumstances of the case, without saying that the bankrupt cannot in any case present a petition for the removal of an assignee, I think that this petition must be dismissed, and that *Beech* is not entitled to any exception from the usual consequences of such dismissal, namely, the payment of costs.

Petition dismissed.



Ex parte PETER HARRIS ABBOTT.—In the matter of
P. H. ABBOTT.

Westminster,
April 30.

Practice, on application to set down two petitions of different parties to come on together.

MR. *Anderdon* applied on the part of the bankrupt, who had petitioned to annul the fiat, to have the petition Bankrupt not entitled to a copy of the deposition on which the adjudication proceeded, on his petition to annul.

set down for an early day,—to have another petition presented for the same purpose by another party (which had been answered for a different day) set down for hearing on the same day, so that the two petitions might come on together,—and that the bankrupt petitioner might be furnished with a copy of the deposition on which the adjudication proceeded.

1841.

Ex parte
ABBOTT.

Sir JOHN CROSS.—You may have your own petition set down for an early day; but the Court cannot make any Order as to the other, on your *ex parte* application; neither can it order you a copy of the deposition. The deposition will be no evidence against the bankrupt, unless it is verified by affidavit; nor can it be read at the hearing, unless you have notice previously of the intention to read it, and are furnished with a copy.

Ex parte ROBSON.—In the matter of AMNER.—

THIS was the petition of a creditor to expunge a proof, which had been made by the assignee of one *Brookes*, a bankrupt. The objection to the proof was, that it was admitted on the mere affidavit of the assignee, without any affidavit having been made by *Brookes*, as to the amount and nature of the debt.

Westminster,
May 1.

Where a creditor becomes bankrupt, he must join with his assignee in the affidavit in proof of the debt. The affidavit of the assignee, alone, is not sufficient.

Mr. Keene, and Mr. Anderdon, in support of the petition, contended that *Brookes* ought to have joined in the affidavit.

Mr. Swanston, and Mr. Bacon, *contrà*.

1841.

Ex parte
ROBSON.

Mr. *K. Parker*, for the assignees of *Anner*, submitted to any Order.

Sir JOHN CROSS.—The proof should not have been admitted, without *Brookes* joining in the affidavit.

ORDERED as prayed.

Westminster,
May 6 & 31.

Serjeants'
Inn Hall,
July 20 & 27.

Ex parte EYRE.—In the matter of ANTHONY GEORGE WRIGHT BIDDULPH and others.

A customer who keeps at his bankers for safe custody a box, to the key of which the bankers have access, lends to a partner in the bank some railway bonds contained in the box, on the security of certain certificates, which are thereupon deposited in the box, together with a

THIS was a petition praying for the sale of certain shares and other securities, with liberty for the petitioner to bid, and to prove for so much of his debt as should not be satisfied by the proceeds of the sale. The statements of the petition were in substance as follows. The petitioner, who kept an account with the bankrupts as his bankers, deposited at the Bank, for safe custody, a box marked with his initials and containing securities of various descriptions. The key of this box was placed, with other keys belonging to numerous other customers

memorandum stating the circumstances of the loan, but not fixing any time for the replacement of the bonds. Afterwards the partner, without the customer's knowledge, removes the certificates, and substitutes for them other securities. The firm becomes bankrupt: *Held*—

1. That the joint estate was not liable, in respect of the abstraction of the certificates.
2. That, although no time was fixed for the replacement of the bonds, the abstraction of the certificates rescinded the loan, and gave the customer a right of proof against the separate estate of the partner; the authority of *Utterson v. Vernon* not applying to such a case.
3. That the sum proveable was not the value of the certificate, but the value of the bonds at the time of the abstraction of the certificates.
4. That the customer was entitled to an Order for a sale of the securities substituted without his knowledge, with leave to prove for the difference between the proceeds and the value of the bonds.

The same customer lends other railway bonds to the firm, on having deposited in his box as a security railway bonds of a different description, together with a memorandum engaging the firm to replace the original bonds at or within the expiration of three months, if required so to do. On a petition stating this transaction, and that the substituted bonds had been withdrawn and others substituted for them, but not stating that any request for replacement of the original bonds had been made, nor containing any statement as to the customer's knowledge of the last substitution, except one to the effect that the substitution was made at the request of the firm; *Held*, that the customer had no proveable debt in respect of this loan.

of the bank, in a cupboard to which both the customers and the partners in the bank had access. In 1835, this box contained (among other securities) certain bonds issued by a railway company in Cuba, for sums amounting in the whole to £53,200, bearing interest at 6 per cent. For these bonds, which were payable to the bearer and transferable by delivery, the petitioner had paid to the bankrupts, through whose agency the loan was negotiated in England, £48,412, being at the rate of £91 per cent. The bonds remained in the box until the month of September 1838, when *John Wright*, one of the partners in the banking house, asked the petitioner for the loan of part of them, amounting to 25,000*l.*, offering to deposit as a security upwards of 400 certificates of shares in the London and Southampton Railway Company. The petitioner having acceded to this request, the following letter was addressed to him by *John Wright*.

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EYRE.

“ London, Sept. 19th 1838.

“ To *Vincent Eyre*, Esq.

“ I hereby, in consideration of your lending me twenty-five thousand Cuba bonds, deposit with you four hundred certificates in the Southampton Railway, and which four hundred shares I hereby in every way agree to assign to you, till the said Cuba bonds are redeemed by me; and should I fail in my obligation, you are at liberty to dispose of the same for your own reimbursement within four months.

JOHN WRIGHT.”

Accordingly, upon the 19th September 1838, 25,000*l.* in Cuba bonds were taken out of the box, and 398 London and Southampton Railway certificates were, together with the above letter, deposited in their stead. On the following day, the following memorandum was

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Eyre.

drawn up by Mr. *Joseph Beadle*, the confidential clerk of the banking house, and placed in the box.

"For the loan by Mr. *Vincent Eyre* to Mr. *John Wright* of twenty-five thousand Cuba bonds, Mr. *Wright* has deposited in Mr. *Eyre's* box one hundred and twenty-five old, and two hundred and seventy-three new shares in the London and Southampton Railway Company, as security, to which Mr. *Wright* will add some other shares when received from Mr. *Easthope*.

Sept. 20th 1838.

For *W. & Co.*

JOSEPH BEADLE."

Some time afterwards 31 other London and Southampton Railway certificates were deposited by *John Wright* in the box, making altogether, 429. The second transaction took place in November 1839, when the petitioner having agreed to lend to the banking house his remaining 28,200*l.* Cuba bonds, on their giving as a security 33,000*l.*, Norris Town and Valley Railway bonds, the following letter was addressed to him in the handwriting of *Joseph Beadle*, and signed by *John Wright*.

Henrietta Street, 19th November 1839.

"My Dear Sir,

"On the 20th September 1838, you lent me twenty-five thousand pounds Cuba bonds, to secure the replacement of which I made over to you four hundred and twenty-nine certificates of shares in the London and South Western (*a*) Railway Company. I expect to be able to replace the above Cuba bonds in March or April 1840. In respect of twenty-eight thousand two hundred Cuba bonds, which I borrow from you this day on account of the house, we deposit as a security thirty-three thousand pounds Norris Town and Valley Railway bonds, and

(*a*) This was then the name of the company, which was originally called the London and Southampton Railway Company.

we hereby engage to replace the said Cuba bonds at or within the expiration of three months from this date, if you should require us to do so. As we wish in this transaction to give you ample cover, we put the Norris Town and Valley Railway bonds at the price of 70 per cent.; they were not to be issued under 92. Mr. *Morrison* took 10,000*l.* at the rate of 95, but we expect to receive, by the Great Western, Illinois State bonds, which we can then exchange against the present securities, if you should prefer it. We feel ourselves in this instance much obliged by your kind acquiescence to my request, the accommodation may enable us to obtain with greater facility any advance that we may occasionally require, while the present feeling continues to prevail against American securities in the money market.

I am, my dear Sir,

To

Your's most sincerely,

Vincent Eyre, Esq.

JOHN WRIGHT."

On the 19th day of November 1839, accordingly, the 28,200*l.* Cuba bonds were taken from the box and replaced by 33,000*l.* Norris Town and Valley Railway bonds, which were securities payable to the bearer, and transferable by delivery. The petition then stated, that on the 27th of February 1840 these last mentioned securities were, at the request of the firm, exchanged for Cairo City and Canal bonds, which were securities for money raised for making a canal and a city to be called Cairo, at the junction of the Ohio with the Mississippi, and were also payable to the bearer and transferable by delivery. No further communication took place between the bankers and the petitioner relative to the securities; and on the 17th day of December 1840 the fiat was issued. Upon examining the contents of the box on the 23rd of November, the day on which the bank

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stopped payment, the petitioner found that the 429 certificates of shares in the London and Southampton Railway had been taken out, and that 14,500*l.* debentures of the Commercial Steam Packet Company, 6000*l.* bonds of the Maryland and New York Iron and Coal Company, and 80 certificates of shares of 25*l.* each, in the name of *John Wright*, in the New Zealand Land Company, had been deposited in the box. All these substituted securities were also payable to the bearer, and transferable by delivery, and along with them were found the following memoranda, which were entirely in the hand writing of *Joseph Beadle*, and were written on the above mentioned letters of the 19th of September 1838.

" July 13th 1840.

" Delivered to Mr. *John Wright* certificates for one hundred shares, part of the within mentioned shares deposited as a security, in lieu of which he has deposited 5000*l.*, bonds of the Maryland Iron and Coal Company, for the same purpose.

For *W. & Co.*

JOSEPH BEADLE."

" July 30th 1840.

" Delivered to Mr. *John Wright*, one hundred London and Southampton Railway Company shares, part of the within mentioned, of which 21 are returned. J. B."

" October 21st 1840.

" Delivered to Mr. *Wright*, fifty shares of London and Southampton Railway Company, part of the within mentioned, and deposited in lieu thereof 5000*l.* Commercial Steam Company debentures."

" October 30th 1840.

" Delivered to Mr. *Wright*, one hundred shares, further part of the within mentioned, and deposited in lieu thereof, 5000*l.* Commercial Steam Company debentures.

J. B."

There was another memorandum, dated November 13th 1840, to a similar effect, and also the following memorandum without date or signature, written on a scrap of paper, in the handwriting of *John Wright*. "80 New Zealand shares, and 5000*l.* or 6000*l.* Maryland bonds, substituted in lieu of Southampton shares." The interest on the whole 53,200*l.* Cuba bonds was regularly credited half yearly to the petitioner by the banking house in their running cash account with him, up to and including the 5th of September preceding the bankruptcy. The interest, which had accrued due from the 5th of September to the date of the fiat, amounted to 477*l.* 9*s.* 3*d.*, in respect of the 28,200*l.* Cuba bonds lastly taken from the box, and to 423*l.* 5*s.* 9*d.* in respect of the bonds first taken. It was also stated in the petition, that Cuba bonds were seldom or ever in the market for sale, so that the value of them on any given day could not be ascertained. The prayer of the petition was for a sale of the Commercial Steam Packet Company's bonds, the Cairo City and Canal bonds, and the New Zealand Land Company's shares, with liberty to bid, and prove against the joint estate for the difference, if the sale should not produce enough to pay the petitioner his debt of 48,840*l.* 15*s.* and the incidental expenses.

Mr. *Bethell*, and Mr. *Bacon*, for the petitioner. First, as to the 25,000*l.* Cuba bonds; the petitioner is entitled to retain the securities which were substituted without his knowledge for the London and South Western Railway certificates, and after realizing those securities to prove for the difference between the amount of the proceeds and the value of the certificates, either against the joint estate, or against each separate estate. He will then be

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Eyre.

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entitled to retain the dividends received upon this proof, as a security for the value of the Cuba bonds which he lent to the bankrupt, *John Wright*, on the security of the South Western Railway certificates. For the value of these certificates, every member of the firm is liable. They held them for safe custody, in the character of bailees or trustees; and if they permitted one of the trustees to deal with them in a manner inconsistent with the trust, they are each of them responsible for the breach of trust. It is not necessary for this purpose that they should have had actual notice of the wrongful act having been committed; for, "if by using the ordinary diligence which their calling requires," they might have had notice, that is sufficient; and so it was held in *Fauntleroy's case* (a), where an entry in a pass book, into which no one of the other partners had looked, was considered sufficient notice to the firm that money had been drawn out by *Fauntleroy*, and applied to his own purposes. Here the box was in the custody of the firm, who must be held to have had notice of its contents. Then, with regard to the amount for which the dividend to be received on the value of the South Western Railway certificates is to be a security, that amount must be, not the value of the Cuba bonds at the date of the fiat, but their value at the time of the loan; for the loan of the Cuba bonds was a simple lending, not a loan upon an agreement for a retransfer. If there be a loan of stock which is to be replaced, the amount proveable is the value at the date of the fiat; but if the loan be unaccompanied with any agreement to replace it, the debt is of course the amount which the

(a) *Marsh v. Keating*, 1 M. & A. 605; *Ex parte Bolland*, Mont. & M'A. 315.

debtor has received, that is to say, the value of the stock at the time of the loan.

Secondly, with regard to the 28,200*l.* of Cuba bonds ; it will not be disputed that this was a loan to the firm, or that consequently the petitioner has a right of proof in respect of this transaction against the joint estate, after selling the Cairo bonds, which were substituted as a security for the Cuba bonds. The only question will be, as to the amount of the debt. Now the terms of the memorandum, with respect to this loan, differ from those of the memorandum referring to the former transaction, the engagement being to replace the bonds within three months if required. The interpretation of this language must be, that the petitioner was to be at liberty to treat the transaction as an engagement to replace within the specified time, or as a loan generally ; and, adopting it in the latter character, he is entitled to estimate his debt, as in the other case, at the value of the bonds at the time of the loan.

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Eyre.

Mr. *Swanston*, and Mr. *Dixon*, for the assignees. With regard to the first loan. It was a private transaction between the petitioner and the bankrupt *John Wright*, with which the partnership had nothing to do. The South Western Railway certificates belonged to *John Wright*, who never parted with the possession of them, since he had throughout access to the box in which they were deposited. How then could the firm under any circumstances be responsible for the mode in which the bankrupt *John Wright* dealt with his own property ? Were they to take cognizance of any private arrangement entered into with regard to it between him and the petitioner ? But, independently of this consideration,

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Ex parte
Evans.

and supposing the South Western Railway certificates had been the property of the petitioner, the other partners are not responsible for the wrongful act of *John Wright*. He cannot be considered as their agent, nor can the clerk *Beadle* be considered as their agent to do a wrongful act. The firm were merely bailees of the railway bonds, and only bound to take such care of them as they would in respect of their own property. You must establish a case of gross negligence, to make them responsible. If you could make them liable in this case, you could in one of actual robbery; for the same principle would apply to both cases. [Sir *J. Cross*. There must be "crassa negligentia" to create liability.] *Finucane v. Small* (a) is a much stronger case on this point, than the present; for the defendant there was not a gratuitous bailee, as the parties were here, and yet he was held to be exempt from liability. Whatever proof can be established, therefore, must be against the separate estate of *John Wright*, only; and, with regard to the amount for which proof is to be made, the petitioner must elect whether he will adopt the substituted securities, or not; he cannot be allowed to have a double proof in the manner now proposed, first proving for the value of the South Western Railway certificates, and then for the difference between the dividend received on this proof and the value of the Cuba bonds. The value of the latter is the only proveable debt; and it must be estimated at the date of the fiat, the only right which the petitioner has being that of having the bonds replaced, as in the ordinary cases of loans of stock.—*Secondly*, with regard to the loan of the 28,200*l.* Cuba bonds; since the petitioner consented to take the Cairo bonds as a security, he may have them sold; but

(a) 1 Esp. 315.

his debt must be estimated, as in the other case, at the value of the Cuba bonds at the date of the fiat.

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Mr. *Bethell*, in reply. The proposition, that bailees are not responsible for losses occasioned by the crime or violence of third parties, is admitted, but does not apply here. If the members of a partnership become bailees, in their character of partners, and one of the firm destroys part of the property entrusted to the partnership, there can be no doubt that the other partners would be liable. It is a partnership transaction; the members of the firm agree to stand in the relation of bailees to the customer. [Sir *J. Cross*. Can the circumstance of the bankrupts having been partners in trade make any difference in this respect, or did the custody of these documents form part of the partnership dealings; and could it be said, that the firm had any lien on the contents of their customer's boxes, or any interest in the custody of them?] The custody is incident to their trade. One of the four co-bailees violates the contract entered into by the firm, who are unable to fulfil their engagement, not by any act *ab externo*, but by the conduct of one of the co-bailees. The principles and authority advanced on the other side have no application to such a state of things as this. [Sir *J. Cross*. The difficulty arises from the fact, that you dealt with *John Wright* separately, and you permitted him to place in your box property, as a security in which therefore both you and he were thenceforth interested; then one of the parties interested in this property removes it, and the question is, whether the firm were bound to inquire if the removal was according to the separate contract, and whether they can now be held responsible for it.] The case is simply one of a breach of trust. If

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stock is transferred into the names of *A. B.* and *C.*, to secure money due to me from *A.*, that would not prevent *A. B.* and *C.* from being responsible either jointly, or severally, as I thought fit.

Sir JOHN CROSS.—I shall take time to consider the judgment to be given in this case, but it appears to me that the arguments for the petitioner have proceeded on a wrong assumption of a matter of fact; I do not think the South Western Railway certificates were deposited with the firm; they were placed in the box by *Wright* alone, in respect of a separate dealing between him and the petitioner, with which the other partners had no concern. He, who deposited them in the box, was entrusted with the key to take them out again.

Cur. adv. vult.

Westminster,
May 31.

On this day, his Honor called the attention of the counsel for the petition to the authority of *Utterson v. Vernon* (a), and inquired if the counsel for the assignees admitted that any demand had been made by the petitioner for the replacement of the Cuba bonds prior to the bankruptcy; and, on the counsel for the assignees declining to make any such admission, his Honor desired that the case might be re-argued, and especially with reference to the point decided in *Utterson v. Vernon*.

Serjeants'
Inn Hall,
July 20.

The petition came on accordingly on this day for argument.

Mr. *Bethel*, and Mr. *Bacon*, for the petitioner. Upon considering the circumstances of this case, and compar-

(a) 4 T. R. 570.

ing them with those of *Utterson v. Vernon*, it will appear that the authority of that case does not apply to either branch of the present one. First, it does not apply to the proof arising out of the loan of the 25,000*l.* Cuba bonds; for the debt, which the petitioner seeks to prove in respect of that transaction, is not founded on the loan of the bonds, but on the misappropriation of the South Western Railway certificates, substituted in their stead, which the bankrupts held in trust for the petitioner. There was no loan or contract for replacement of them; but there was a misapplication, or breach of trust, which created a proveable debt at the very moment at which it took place, just as the improper selling out by a trustee of part of a trust-fund would do. It makes no difference, that those railway bonds were a security merely, or that, consequently, one of the bankrupts had an interest in them; for a mortgagee is as much the proprietor of the stock, as regards such a question as this, as if he were the absolute owner. This branch of the case is, therefore, not governed by the class of authorities to which *Utterson v. Vernon* belongs, and which proceed on the ground that no contract was broken at the date of the bankruptcy. Nor do these authorities apply to the second branch of the case, in which the contract was, to replace the bonds at or within the expiration of three months, if required. The import of these words is, perhaps, rather ambiguous; but the more probable construction of them appears to be, that the bankrupts undertook to replace the bonds at all events at the expiration of three months, but within that time if requested. The only other construction of which the words are susceptible is one, which would be inconsistent with their expressing any engagement to replace

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the bonds at all after the expiration of the three months. Supposing the two constructions equally probable, the petitioner has the right of choosing between them; and if the former be adopted, the case would fall not within the authority of *Utterson v. Vernon*, but within that of *Moses v. M'Farlane (a)*.

Sir JOHN CROSS.—The petitioner has shown what was the construction which he put on the words, by continuing to receive the dividends after the expiration of the three months, when, according to the present argument, the bonds would have been tortiously retained. Does the memorandum amount to more than an agreement to replace generally, with a special contract to replace within three months if requested?

Mr. *Swanston*, and Mr. *Dixon*, for the assignees. The first branch of the case is disposed of by the authority of *Utterson v. Vernon*; for the grounds, on which the petitioner tenders his proof upon the South Western Railway certificates, instead of the Cuba bonds, were shown on the former argument to be utterly untenable. And it is now clear, that the petitioners cannot have any right of proof against the separate estate of *John Wright*; for, if the petitioner elects to treat the last substitution as a tort, it can give no right of proof; and if, on the other hand, he affirms the substitution, he must be in the same situation as if it had not taken place, and depend on the original contract, which, being for a replacement generally, falls within the authority of *Utterson v. Vernon*. The second branch of

(a) 2 Burr. 1010, 1011.

the case is disposed of by the observations which have been made on it by the Court.

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Mr. *Bethell*, in reply.

Cur. ad. vult.

Sir JOHN CROSS.—In this case, Mr. *Eyre*, the petitioner, had various dealings and transactions with *Wright & Co.*, his bankers, and also with *John Wright*, one of the partners in that firm; and it appears that a box was kept at the bank for the exclusive purpose of depositing Mr. *Eyre's* securities; and there were deposited in that box certain bonds relating to a railway in the island of Cuba, purporting to be of the value of upwards of 50,000*l.*, and bearing interest at six per cent., the property of the petitioner. In the month of September 1838, *John Wright* addressed to the petitioner the following letter: [His Honor here read the letter, which has been already stated (a).]

Serjeants'
Inn Hall,
July 27.

The petitioner acceded to this proposal, and *Wright* thereupon took the proposed portion of the bonds out of the box, and placed in their stead the proposed certificates of the South Western Railway shares.

Some time afterwards, but before the bankruptcy, *John Wright*, in contravention of the agreement, withdrew the South Western shares, without the knowledge of the petitioner, and placed in lieu of them certain other securities of less value, which the latter now retains.

Under these circumstances, the first question is, whether the petitioner has a proveable debt, in respect of the loan of these Cuba bonds. After the first argument, and while this case stood over for judgment, it appeared to

(a) See *ante*, p. 67.

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me necessary to call the attention of the counsel to the case of *Utterson v. Vernon* (a), decided by the Court of King's Bench in the time of Lord *Kenyon*, and which I thought had an important bearing upon the question arising on this petition; and I desired it might be re-argued with reference to that case, which had been entirely overlooked. In that case, 10,000*l.* government stock had been lent to the bankrupt, upon an agreement to replace the stock, and in the meantime to pay the usual dividends; and the bankrupt gave an assignment of a ship as a security, which was to be returned to him when the stock should be replaced. But no time was actually appointed for that purpose, nor was the bankrupt ever required by the lender to replace the stock at any time before the bankruptcy. The Court at first decided that the lender of the stock had a proveable debt; but, that decision being unsatisfactory to the Lord Chancellor *Thurlow*, he desired it might be reconsidered, which was done accordingly, and then the Court decided it was not a proveable debt, on the ground that there was no breach of contract on the part of the bankrupt before the bankruptcy. The case *Ex parte King* (b) was a similar case, and there Lord *Eldon* said, "It has often been determined in bankruptcy, that, if the condition is broken, you may prove; but there is no instance of admitting the proof, where the condition was not previously broken." And again, in *Ex parte Campbell* (c), where a bankrupt on his marriage covenanted with trustees, that, whenever afterwards requested, he would assign to them 2000*l.* stock; but he was not before the bankruptcy re-

(a) 4 T. R. 570.

(b) 8 Ves. 339.

(c) 16 Ves. 244.

quested to assign the stock; Lord *Eldon* said, the case of *Utterson v. Vernon* is decisive against the claim, if no such request was made.

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Eyre.

This, then, being the established rule of law, it only remains to be considered, whether, in this transaction respecting the Cuba bonds, there was in fact a breach of contract before the bankruptcy. Now the contract was, that, in consideration of the one creditor lending the bonds, the other undertook to place simultaneously the railway certificates at the disposal of the lender, until the bonds should be restored. But, instead of doing so, the borrower withdrew the railway certificates, and disposed of them to his own use. I think he was bound at the same time to replace the bonds, and that, not having so done, *J. Wright* thereby violated his engagement, and became amenable to an action at law; and, this having occurred before the bankruptcy, I am of opinion that the petitioner is entitled to come in as a creditor upon the separate estate of *J. Wright*, for the value of his bonds at the time the contract was broken,—that is, when the railway certificates were withdrawn, and the contract thereby rescinded. With regard to the securities appropriated to the petitioner in lieu of those certificates, and which are now in his possession,—I think he is entitled to have them sold for his benefit, in the usual way, as required by his petition. But, with regard to the arrears of interest on these Cuba bonds, which he also claims, I think the petitioner is not entitled to any interest that may have accrued after the breach of contract.

It has also been contended on behalf of the petitioner, that, inasmuch as his box of securities was left in the

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Eyre.

custody of the firm, the whole partnership is responsible jointly and severally as for a breach of trust, in consequence of *J. Wright* having withdrawn the railway certificates without the knowledge or consent of Mr. *Eyre*. But on this point I am of opinion, that as the transaction was entirely between *Eyre* and *Wright* alone, and that as those securities were so withdrawn, as far as appears, without the knowledge or privity of the other partners, and that they do not appear to have derived any benefit or advantage therefrom, I am of opinion they are in no respect liable for any loss in this transaction.

Having now disposed of this first branch of the petition, I come to the second, namely, the subsequent loan to the firm of the residue of the petitioner's Cuba bonds, purporting to be of the value of 28,000*l*. Between these two loans there appears to be an essential difference. In the course of the next year *John Wright* addressed another letter to the petitioner, containing a similar request to the former, in the following terms :—

“Henrietta Street, 19th Nov. 1839.

“My dear Sir,

“On the 20th September 1838, you lent me 25,000*l*. Cuba bonds, to secure the replacement of which I made over to you 429 certificates of shares in the London and South Western Railway Company. I expect to be able to replace the above Cuba bonds in March or April 1840. In respect of 28,200*l*. Cuba bonds, which I borrow from you this day on account of the house, we deposit as a security 33,000*l*. Norris Town and Valley Railway bonds. And we hereby engage to replace the said Cuba bonds at or within the expiration of three

months from this date, if you should require us to do so."

The securities here mentioned were, accordingly, with the consent of Mr. *Eyre*, duly exchanged, and so remained to the time of the bankruptcy, the firm having till then continued to credit him with the interest on these bonds as before, and he not having required them to be replaced; but it has been contended, that, by the terms of the second letter, these bonds were to be replaced within three months, and that time having elapsed, the contract to replace them was then broken. The terms are somewhat equivocal; but whichever way they may be construed, this is clear, that the replacing of the bonds was deferred by mutual consent till after the bankruptcy, and there was consequently no antecedent breach of contract in that respect. I am therefore of opinion, for the same reason that the other debt is proveable, that this is not; and the consequence is, that I cannot regularly direct the securities held in lieu thereof to be sold; but I think the holder is entitled to the full benefit of them, in satisfaction of this debt, which, it is to be hoped, are of adequate value, as Mr. *Eyre* seems to have so considered them at the time of the exchange. I am of opinion, however, that the arrears of interest on these bonds constitute a proveable debt, amounting, it appears, to the sum of 477*l*.

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Eyre.

1841.

*Westminster,
November 15.*

A petition to rehear will not be dismissed, because the Order on the former hearing has not been drawn up.

A petition states a transaction in such a way, as to imply an assent to it on the part of the petitioner; but the allegation, from which the inference arises, is not contained in the petitioner's affidavit in support of the petition. An Order having been made, a petition of rehearing on the ground of surprise, supported by an affidavit that no assent had been given, and that the allegation in the petition had been only inferred to remain unexplained, because it was not considered that any question would turn upon it, was dismissed with costs; the Court holding, that the allegation amounted to an assent, on the footing of which, the order was made.

Ex parte EYRE.—In the matter of ANTHONY GEORGE WRIGHT BIDDULPH and others.

THIS was another petition by the same petitioner for a rehearing of the last case, so far as regarded the loan of the 28,300*l.* Cuba bonds to the partnership; and, after detailing the allegations of the former petition, including that, whereby the Norris Town and Valley Railway bonds were alleged to have been removed, and the Cairo bonds substituted, at the *request* of the bankrupts, it set out the affidavit of the petitioner in support of the previous petition; the passage of the affidavit corresponding to the above allegation being to the following effect:—That the Norris Town and Valley Railway bonds were, on or about the 27th of February 1840, exchanged by the copartnership for Cairo City and Canal bonds of the same amount, and that the Cairo City and Canal bonds were accordingly deposited in the petitioner's box, in lieu of the Norris Town and Valley Railway bonds; and that, to the best of his recollection and belief, no further communication took place between the bankers, or any of them, and himself relative to his said securities. The present petition then proceeded to state, that at the time of the former petition being prepared, it was not considered that there existed any serious question as to the right of the petitioner to prove in respect of the value of the whole of the 53,200*l.* Cuba bonds, the petition having for its object principally to obtain the necessary order for the sale of the securities, and the application of the proceeds in satisfaction of the petitioner's debt; that, at the hearing of the former petition, no question was raised on the part of the assignees, as to the right of

the petitioner to prove in respect of the value of the whole of the 53,200*l.* Cuba bonds; the question argued being, whether, under the circumstances, the petitioner was entitled to prove against the joint estate; and that it was not until the attention of parties had been called by the Court to the circumstances respecting the petitioner's knowledge of the removal of the Norris Town and Valley Railway bonds, that those circumstances were considered by either party to be material; that the petitioner conceived that if the facts and circumstances relating to the removal of the Norris Town and Valley Railway bonds had been accurately stated in the original petition, the Court would have considered that the same principle applied to the loan of the 28,200*l.* Cuba bonds, as had formed the ground of the Court's decision with regard to the 25,000*l.* Cuba bonds; the fact being that the Norris Town and Valley Railway shares had been removed from the box, and the Cairo City and Canal shares substituted in their place, without the consent, privity or knowledge of the petitioner, and without any previous application to him on the subject; but that no importance had been attached by the petitioner, or his advisers, when the petition was prepared, to the facts and circumstances relating to such removal and substitution, save that the same were without the consent of the petitioner. The petition also stated, that the judgment pronounced by the Court had not been drawn up; but that the petitioner conceived that the Court would nevertheless hear the present petition, without waiting until the order was drawn up, under the circumstances of the case; and the prayer was, that the original petition might be reheard, upon the supplemental matter contained in the present petition with respect to the

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matter of the 28,200*l.* Cuba bonds; and that the former judgment, and the order thereupon, might be varied accordingly; and that it might be declared that the petitioner was entitled to prove against the joint estate the value of the said 28,200*l.* Cuba bonds, in like manner as in respect of the 25,000*l.* Cuba bonds, against the separate estate of *John Wright*, or in such other manner, or to establish such other proofs on that behalf as he may under the circumstances be deemed entitled to.

The petition was supported by an affidavit of the petitioner, which was an echo of the petition.

Mr. *Anderdon*, and Mr. *Bacon*, for the petition.

Mr. *Dixon*, and Mr. *Hislop Clarke*, for the assignees. This is not a proper case for a rehearing; it is not pretended that the alleged supplemental matter consists of any facts, which were not known to the petitioner at the time of the original hearing. The greatest inconvenience would arise, if a party were allowed a rehearing, because he after the decision thinks of some circumstance which would have improved his case, according to the view taken of it by the Court. Besides, the petition cannot be reheard, the original order not being yet drawn up; *Ex parte Jenkins* (a). Therefore, independently of the particular facts now stated, the petition must be dismissed. [Sir *John Cross*. I think the Court cannot resist the application to rehear, upon the evidence now tendered.] Then, with regard to the nature of that evidence, it amounts to a contradiction of the case made by the original petition, and there is no instance in which a party has been allowed on a rehearing entirely

(a) 1 D. & C. 222.

to change the nature of his case. The very forms of proceeding are sufficient to show that this is impossible; for the Order must be made upon the original, as well as the present, petition; that is to say, upon a petition containing a statement inconsistent with the Order now proposed to be made upon it. An admission in an answer in Chancery could never be neutralized by a denial in a further answer.

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EVRE.

Mr. *Anderdon*, in reply. No such inconsistency would exist, as is alleged; for there is no allegation in the original petition, to the effect that the petitioner assented to the removal of the bonds; all that is there said being, that the removal and substitution were made at the request of the bankrupts. Even if the petitioner had acquiesced, it would be an acquiescence made in ignorance of his rights, and would not bind him.

Sir JOHN CROSS.—The merits of the question raised by the original petition in this case turned upon one of the nicest balances of jurisprudence. A similar question was referred by Lord *Thurlow* to the Court of King's Bench for its opinion; and the judges of that Court having, after solemn argument, decided the question in one way which was not satisfactory to the Lord Chancellor, reversed their decision upon his sending it back to them for reconsideration. I felt it to be my duty to consider this case with reference to that judgment, and I took the utmost care to make my decision conformable to the opinion which the judges there ultimately pronounced. It appears, that the petitioner had securities in a box which was in the custody of the bankrupts, and that these securities were exchanged for others, without (as it

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DREW.

is now said) the consent of the petitioner. He might, however, consent subsequently to the exchange. It is said, he never did so before the bankruptcy; suppose he did not; still, when the matter came before this Court on the former occasion, he expressed no objection to the exchange; and, in the absence of evidence to the contrary, the Court had a right to presume that it was made for his benefit, and that he concurred in it. But the case goes further than this; for in the very petition which he then presented there is a statement, that the exchange was made at the request of the partners, necessarily implying therefore, if not in terms stating, an assent on his part. To this petition he affixes his signature, but does not think it convenient, having regard to the actual fact, to follow in his affidavit the passage in the petition to which I have referred. The assignees, however, have acted, as they were justified in doing, upon the statement in the petition; and now the petitioner comes here, not to correct a misstatement, but to retract the assent which he had given. It appears to me, that he is estopped from so doing; but it is sufficient, that the judgment of the Court proceeded upon the footing of his having assented, to prevent him from now having the case reheard. The petition of rehearing must be dismissed with costs.

ORDERED accordingly.

Westminster,
May 24.

Time for opening fiat not enlarged, on petition of bankrupt, to facilitate a composition by means of a trust deed.

Ex parte DREW.—In the matter of DREW.

THIS was the petition of the bankrupt, praying that the time of opening the fiat might be enlarged, for the

purpose of affording time for the arrangement of the bankrupt's affairs by means of a trust deed.

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Ex parte
Drew.

Mr. *Swanston*, in support of the petition. Although in one or two late cases applications of this kind have been unsuccessful (a), yet formerly, if the petitioning creditor consented, the order used to be made, unless there appeared some special grounds for refusing it. The only mischief, which Lord *Eldon* apprehended in acceding to applications like this, was the prejudice which the bankrupt would be exposed to, if a creditor were permitted to use a fiat as a means of driving the bankrupt into the creditor's own terms. That objection does not apply to this petition, it being presented by the bankrupt himself.

Sir JOHN CROSS.—This is the application of the bankrupt, who takes upon himself to inform the Court, that some of his creditors, including the petitioning creditor, have entered into an arrangement for the execution of a trust deed. But how can the bankrupt execute a valid trust deed, if he has committed an act of bankruptcy? The creditors are not represented here; and even if the petitioning creditor consented, the Court must protect the interests of the other creditors. The Court is properly jealous of compromises between the petitioning creditor and the bankrupt.

No ORDER made.

(a) See *Ex parte Doughton*, Mont. & Bli. 264; 1 D. & C. 111; *In the matter of Moody*, 2 D. & C. 210; *Ex parte Stirk*, 3 M. & A. 209; 2 Dea. 328; *Ex parte Castle*, Mont. & Ch. 655.

*Serjeants' Inn
Hall,
May 24, 1841.*

Attendance of
the witness at
the opening of
fiat, to prove
the act of bank-
ruptcy under
1 & 2 Vict.
c. 110, s. 8,
dispensed with.

Ex parte JOSEPH BOWMAN and another.—In the matter of **EDWARD SKILLMAN and ASHLEY COOPER KEILER.**

THIS was the petition of the petitioning creditors, praying that their attendance, and that of the witness who was to prove the act of bankruptcy (*a*), might be dispensed with at the opening of the fiat; the act of bankruptcy being the omission to pay or give security for the petitioning creditors' debt, after the service of notice pursuant to 1 & 2 Vict. c. 110, s. 8; and the evidence intended to be adduced being that contained in two proposed depositions, which were set out in the petition.

The first of these was a deposition of *Joseph Bowman*, one of the petitioning creditors, which, after deposing to the existence of the petitioning creditors' debt, went on to state, that the deponent did, on the 8th of April last, make an affidavit of the debt to the effect thereinbefore stated, and that such affidavit was duly sworn and filed in the Court of Bankruptcy on that day; that on or about the 10th of April, the deponent caused a notice signed by him, requesting payment of or a security for his debt, to be served on the bankrupts, pursuant to the statute in that case made and provided, and that the bankrupts had not compounded for the said debt. The other proposed deposition was that of one *Henry Prosser*, to the effect that, on the 18th of May, the deponent had duly made search in the proper office of the Court of Bankruptcy, and that no bond or obligation had been entered and filed in that Court, by or on behalf of the bankrupts, as required by the statute, and in pursuance of the notice given and the affidavit made

(*a*) See *Ex parte Rowe*, 2 Ro. 339.

by *Joseph Bowman*; that the notice and the duplicate thereof were respectively signed by *Joseph Bowman* on the day of the date thereof, in the presence of the deponent; and that office copies of the notice and affidavit were annexed to that deposition. The petition stated, that it would be extremely inconvenient for the petitioners to leave their business, and go to Hythe, where the fiat was to be opened; and the prayer was, that the attendance of the persons who had made these depositions might be dispensed with; that the deposition of *Joseph Bowman* might be received as sufficient evidence of the petitioning creditors' debt, the office copy of the petitioning creditor's affidavit be admitted by the Commissioners, as sufficient evidence of the affidavit being so made and filed as was stated in the deposition; and that the other proposed deposition might be admitted as sufficient evidence that no bond had been entered or filed in the Court of Bankruptcy by the bankrupts, as required by the statute.

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Ex parte
BOWMAN
and another.

Mr. *Kenyon Parker* for the petition.

The COURT made an ORDER in the following form:

"That the Commissioners acting in the execution of the said fiat, be at liberty to receive as evidence of the petitioning creditors' debt, on opening the said fiat, an office copy of the affidavit as to the debt of the said petitioning creditors, filed in the office of the Lord Chancellor's Secretary of Bankrupts, at the time of striking the docket on which such fiat issued, or such further evidence by affidavit as the said Commissioners shall think fit to require; and that the personal attendance of the said petitioners as such petitioning creditors, and of the said *Henry*

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and another.

Prosser, before the Commissioners on opening the said fiat, may be dispensed with. And it is ordered that the said Commissioners be also at liberty to receive, on opening the said fiat, an office copy of the affidavit of the said petitioner, *Joseph Bowman*, so filed in the said Court of Bankruptcy on the 8th day of April last, as good and sufficient evidence of such affidavit having been so made and filed; and that in like manner the said Commissioners be at liberty to receive and admit, as good and sufficient evidence, the deposition of the said *Henry William Prosser* that no bond hath been entered or filed with the said Court by or on behalf of the said *Edward Skillman* and *Ashley Cooper Keiler*, as required by the said statute, and in pursuance of the said notice so given to them by the said petitioner, *Joseph Bowman*."

Ex parte CHARLES GREGORY.—In the matter of
THOMAS SAUNDERS CAVE.

Ex parte RUSHBROOKE.—In the same matter.

Westminster,
May 25.

Where the bankrupt had carried on business in London, which was his last place of domicile, having been also engaged in mining speculations in Cornwall, and had been subsequently living with a relation near Dover under a feigned name, a fiat that had been issued to Commissioners at Dover was ordered to be impounded, and the proceedings under it transferred to the Court of Bankruptcy in London, to which a renewed fiat was ordered to be issued.

THIS was the petition of two persons claiming to be creditors of the bankrupt, praying that the fiat might be transferred to one of the Commissioners of the Court of Bankruptcy, in London; or that it might be impounded, and a renewed fiat issued to a London Commissioner; or else that it might be annulled, and a new fiat issued to a London Commissioner; and that the costs of the application might be paid by *Elizabeth Lindley Bowen*.

The petition stated, that the bankrupt, from the year

The petition stated, that the bankrupt, from the year

1836, was engaged in a mining speculation in Cornwall, but also carried on the business of a merchant, residing principally in London, first at Thomas's Hotel in Berkeley Square, and afterwards in Park Lane near Grosvenor Gate; and that, whilst residing at the last place, he became indebted to the petitioner in the sum of 120*l.* 15*s.* 6*d.* for goods sold and delivered. That during some part of this time, however, he had a counting-house in Bread Street, Cheapside, and had also a residence and some place of business in the county of Cornwall, where he carried on his other dealings. In December 1840, it was discovered that the bankrupt was residing at Walmer in the county of Kent with Mrs. *Elizabeth Lindley Bowen*, his wife's aunt, under the feigned name of *T. S. Brown*. On the 1st January 1841 the bankrupt was arrested at Walmer, at the suit of an execution creditor, and lodged in Dover Castle.

On the 9th February 1841 a fiat was issued against the bankrupt by Mrs. *Bowen*, as the petitioning creditor, directed to Commissioners for the Eastern Division of the county of Kent, describing him as "of Walmer in the county of Kent, and formerly of Thomas's Hotel, Berkeley Square, in the county of Middlesex, and of Ludgwan in the county of Cornwall, but then a prisoner for debt in the gaol of Dover Castle, merchant, dealer, and chapman."

The petition alleged, that all the property which had been discovered to belong to the bankrupt was situate in Cornwall, with the exception of a small portion near London; and that, with the exception of a few creditors resident in Cornwall, and the execution creditor who resided at Paris, a large proportion of the bankrupt's creditors, except the shareholders in the mines, were resident in London; the others residing in various parts

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of England and Scotland ; and that none of the creditors were resident at Dover, nor had the bankrupt any dealings or business at that place.

Assignees had been chosen under the fiat, of whom one was a clerk in an attorney's office ; and the last examination of the bankrupt had been adjourned to the 29th May instant.

It was alleged, that the bankrupt had since the year 1836 been engaged in very extensive dealings to the amount of several hundreds of thousands of pounds ; and that it was expedient, therefore, in order that the particulars of the estate might be ascertained, and the same properly administered, that his dealings and transactions should be minutely investigated. That the assignees were resident at considerable distances from Dover, and could not discharge their duties, without great expense in travelling to and from Dover, and therefore that it was highly expedient that the fiat should be worked in London. That the bankrupt's books and papers were in the hands of two different persons in London, who claimed to have liens thereon, and that the production of them could not be procured, without the expense of those parties travelling with them to Dover, as often as it might be necessary to inspect them.

It appeared that another petition for the same object as the present one had been presented by six other creditors of the bankrupt, but had afterwards been withdrawn, as the petitioner alleged, by the intervention of the bankrupt, and with the view of enabling him to pass his last examination at Dover, in the absence of those creditors who would strictly examine him and ascertain the true state of his affairs.

The petition further alleged, that the proceedings

which had hitherto taken place under the fiat had been managed and conducted principally by the friends and agents of the bankrupt, or by such of his creditors as had been induced to assist him in getting thereby relieved from his debts; and that, unless the proceedings under the fiat should be removed to London, the bankrupt, and the petitioning creditor who was his instrument, would be enabled to defeat the just object of the fiat, to the injury of the general creditors and in abuse of the process of the Court. No sale, or contract for sale, of any part of the bankrupt's estate had yet been made by the assignees.

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*Ex parte*  
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Mr. *Bethell*, and Mr. *Romilly*, appeared in support of the petition.

Mr. *Swanston*, and Mr. *J. Russell*, for the assignees. The present petitioners are persons whose claims have been rejected by the Commissioners. That of Colonel *Rushbrooke* was rejected, on the ground that he was a partner with the bankrupt. There are no precedents for such an application as this, after the choice of assignees. [Sir *John Cross*. In *Ex parte Waring* (a) a commission was ordered to be transferred from Birmingham to Bristol, after the choice of assignees.] Part of the prayer of the present petition is, that the fiat should be superseded. Now, in *Ex parte Fellows* (b), the Vice-Chancellor said that there was no instance of superseding a commission merely for the convenience of creditors, and

(a) Mont. 216.

(b) 2 Madd. 141. In *Ex parte Johnson*, 1 Deac. & C. 221, where all the creditors lived in London, except two, a country commission which had issued, was ordered to be impounded, and a fiat was directed to a London Commissioner.



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he refused in that case to supersede, although the ground of the application was, that the commission was issued to a place where there were only two creditors, and which was distant 200 miles from the great body of the creditors. There are persons claiming to be creditors to the amount of 70,000*l.*, who reside in the county of Kent. If the petitioners had any just grounds for presenting this petition, they ought to have applied before, but they have not come here until they have tried every other scheme to have their claims admitted. The petitioning creditor swears, that she was no shareholder in the mining speculation of the bankrupt, and that she was in no respects acting in collusion with him, for the purpose of evading or eluding the process of the Court. *Ex parte Waring* (a) was no authority for such a case as this. [Sir John Cross. The question here is, not one of cases, but depends on the construction of the act of parliament.] The act of parliament (b) only authorizes the Court to issue a renewed fiat, where, by reason of the death of Commissioners, or for any other cause, it becomes *necessary*; the Court is not authorized to do so, merely on the ground of expediency or inconvenience. The prayer of this petition cannot be supported, except on the ground of the fiat having been improperly worked. [Sir John Cross. The Court must be guided not so much from the details of the past, as what will be best to be done in future.] It is only from the past, that the Court can judge what ought to take place in future. There ought to have been no delay in such an application as this—the petitioners ought to have come promptly to the Court, instead of waiting from February till May.

(a) Mont. 216.

(b) 6 Geo. 4. c. 16. s. 26.

Mr. *Anderdon*, for the petitioning creditor. There ought to be no transfer of the proceedings to another Commissioner, after the choice of assignees; and the petitioners want to effect this object through the medium of a renewed fiat. In *Ex parte Kirby* (a) a renewed commission was ordered to be issued to London Commissioners, where the original commission had been worked at Brighton; but this was only because such a proceeding became necessary from the improper conduct of the commissioners. The Court cannot, under the 26th section of the Bankrupt Act, order a fiat to be renewed, except in a case of inevitable necessity.

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Mr. *Bethell*, in reply, was stopped by the Court.

Sir JOHN CROSS.—It appears to me, as far as I can judge from the facts before the Court, that this fiat has been issued by the procurement of the bankrupt himself, and the place for its execution to have been also chosen by himself. If the solicitor who sued out the fiat had acted properly, he would have had the fiat directed to the place which was the last domicile of the bankrupt; and this place appears to have been Bread Street, in the city of London. Instead of doing this, however, the solicitor sues out a fiat directed to the place where the bankrupt was accidentally found, and where he was living under a false name. I might perhaps have had some doubt, whether the assignees and the petitioning creditor had not been acting *bonâ fide*, if so much zeal had not been shown by them in opposing this petition, set on, too, as it would appear, by the solicitor who was originally employed by the bankrupt. For these reasons,

(a) Mont. & M. 405.

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as well as for the more convenient execution of the fiat, and to save expense to parties who may be obliged to travel to and from Dover during the progress of the working of the fiat, it seems to me desirable that the fiat should be worked in London. I am of opinion, therefore, that a renewed fiat should be issued to a London Commissioner, and that all the proceedings under the present fiat should be transferred to him. As to the question of costs, I think all parties should have their costs out of the estate; but before I allow the petitioning creditor her costs, I must be satisfied, upon her affidavit, that she opposed the petition at her own expense, and that she was not a mere tool in the hands of the bankrupt's solicitor.

Mr. *Bethell* objected to the assignees being allowed their costs out of the estate.

Sir JOHN CROSS.—I think it was incumbent on the assignees to appear on this petition; but it would certainly have been more correct, if they had submitted to any Order of the Court, instead of setting up such a violent opposition to the prayer of the petitioners. On the whole, however, I think they should have their costs out of the estate.

The petitioning creditor having now made an affidavit that she retained the solicitor to oppose the petition at her own expense, the Court also allowed her costs out of the estate.

One ORDER on both petitions; that the present fiat should be impounded, and a renewed fiat issued

to a Commissioner of the Court of Bankruptcy in London, to which all the proceedings should be transferred. All parties to have their costs out of the estate.

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 Ex parte  
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 Ex parte  
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Ex parte HARVEY GEM and JAMES POWLEY.—In the matter of JOHN RUMSEY.—

THIS was a petition of creditors to annul the fiat, which had been issued against the bankrupt as a money scrivener, on the ground that the bankrupt was not a trader.

It appeared from the affidavits of various persons made in opposition to the petition, that some of these persons were acquainted with the bankrupt for a long time, and that they knew him, as they alleged, to be a money scrivener; that, in a bill sent in by him to one of his clients, there was a charge for attending and taking instructions for procuring the loan of a certain sum of money; that he was accustomed to take extra fees for procuring loans, over and above his charge for preparing the deeds and other documents to secure the loans. One witness stated, that she sold an estate to Lord *Carrington*, and that she left the purchase-money in the hands of the bankrupt, to be invested in securities. Two other witnesses deposed, that they, on two several occasions, had deposited different sums of money with the bankrupt, for the purpose of investing the same in securities on real property. Another witness swore, that he paid the bankrupt a sum of money for procuring a loan,

*Westminster,*  
*May 31 & June 1.*

Where an attorney was in the habit of having the money of his clients deposited with him to lay out for them upon mortgage, and received from others a compensation or gratuity for procuring loans of money for them, besides his charges for preparing the mortgage securities, he was held to be a trader within the meaning of the Bankrupt Laws, as a money broker, and a person "receiving other men's monies into his trust or custody," whether or not he might be considered liable to the bankrupt law as a banker or a scrivener.

*Seemle*, that the deposition of a party before the Commis-

sioners may be read in contradiction of a subsequent affidavit made by him, if notice has been given to the other side of the intention to read it, and they have been furnished with a copy.

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independently of his charges in his bill of costs for preparing the mortgage deed.

Mr. *Swanston*, in support of the petition, called on the other side to establish the trading.

Mr. *Anderdon*, and Mr. *M. Chambers*, for the petitioning creditor. The trading we contend for is money scrivening and banking. The first statute relating to bankrupts, in which the word "scrivener" occurs, is the 21 *Jac.* 1. c. 15., in which it is enacted by sect. 2, that every person "that shall use the trade or profession of a scrivener, receiving other men's monies or estates into his trust, or custody," shall be liable to be made bankrupt; and by the 5 *Geo.* 2. c. 30. s. 39., the same liability was declared in the case of *bankers*.

In *Ex parte Bath* (a), where an issue was directed as to the fact of the trading, it was contended before the judge at *nisi prius*, that, from the alteration in the mode in which professional business is now transacted, the business of a scrivener is virtually at an end; but Lord Chief Justice *Best* on that occasion said, "That a scrivener may now exist seems manifest, when we see that in a statute (b), which passed so lately as the year 1825, it is enacted, 'that all persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody, shall be deemed traders.' The question therefore is, did the bankrupt, in the profession of a scrivener, receive other men's monies? and the answer is easy. If an attorney negotiate loans as an attorney, that is, if a person go to his attorney, inform

(a) *Mont.* 82.(b) 6 *Geo.* 4. c. 16. s. 2.

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him that he has a sum of money which he wishes to put out, and desire him to procure security, the money in the meantime remaining in the hands of the party's banker, he is not a scrivener. But if an attorney joins, with his business of an attorney, the business of a scrivener, he is not less a scrivener, because he is an attorney. Now in all the instances proved in this case, the money remained, not in the hands of the party's own banker, but in the hands of Mr. *Burman*, until he could procure suitable security on which to lend it. Was not this receiving other men's monies into his trust or custody? and as he was paid by procuration, was he not acting in the profession of a scrivener? Was he not seeking his livelihood partly as a money scrivener?" In the present case, the bankrupt has admitted taking procuration money for procuring loans; for in one of his own bills there is a charge made by him for this purpose.—We now propose to read the deposition of a person of the name of *Hatchett*, who was a witness to prove the trading before the Commissioners, but who has since made a contradictory affidavit in support of this petition. We have given notice to the other side of our intention to read it, and have also given them a copy of it.

Mr. *Swanston* objected to the reading of this affidavit.

Sir JOHN CROSS.—There is no question but that the respondent might make an affidavit, stating that the party, who has made an affidavit in support of the petition, has previously made a different statement upon oath before the Commissioners. The distinction, then, between that proceeding and reading the deposition itself, after giving the other side notice of the intention

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to read it, and furnishing them with a copy, is very shadowy indeed.

Mr. *Swanston* said, that he did not object to the deposition being read in contradiction of the subsequent affidavit, so that it was not received in proof of the facts stated in it.

Mr. *Anderdon*, and Mr. *Chambers*. We admit, that, in the bankrupt's mode of dealing with his clients, no procuration money was taken from the person who deposited the money to be placed out at interest, but merely from the person who borrowed the money; and this is the constant practice. In a bill delivered by the bankrupt to one of the persons who employed him, there is a charge for "attending and taking instructions for procuring a loan of £——, 3s. 4d." This charge alone is evidence of money scrivening. But his remuneration as a money scrivener proceeded as well from his profit in preparing the deeds to secure the loans, as from his taking a compensation to procure it; and this is the mode of dealing contemplated by the act of parliament. [Sir *John Cross*. You contend, then, that the word "scrivener" in the act of parliament means "scribe."] Our argument certainly goes to that extent. In *Hutchinson v. Gascoigne* (a), where it appeared that an attorney was the general depositary of the money of his clients and other persons who employed him, not simply in his character of an attorney, but as a money agent, to invest their money upon securities at his own discretion, allowing him procuration fees for any sum

(a) Holt, N. P. Rep. 507.

placed out by him on bond or mortgage, as well as a fee or charge for the preparing of the deeds, it was decided that such a course of dealing was substantially the business of a scrivener(a).

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 and another.

But we contend, that the evidence proves another distinct branch of trading, as a *banker*, by keeping other men's monies in his hands; and it is not necessary that he should keep an open shop for this purpose. For in *Ex parte Wilson* (b), where it was argued that the bankrupt in that case could be no banker, because he kept no shop, Lord *Hardwicke* said: "A *scrivener* does not keep an open shop; and yet, as he receives money belonging to other people, and places it out on securities, which is the business of a scrivener, he may be a bankrupt. So may a person acting as a banker, though not keeping an open shop."

Mr. *Swanston*, in reply. The other side have not been able to lay a finger upon one specific act of trading; but have merely gone into evidence of generalities. [Sir *John Cross*. It is true that there is no evidence of one complete act of trading in itself, because there is no special payment proved for procuration money; but then the question is, whether, under all the circumstances of the case, the Court will not infer that there was a scrivening for a profit.] The Court will not infer from general circumstances, that there was a specific payment for procuration money. They have not shown in any one instance, that there was a payment for procuration by any one person who deposited money with the bankrupt to be laid out on security. They must show, that the

(a) And see 1 Deac. B. L. 23.

(b) 1 Atk. 218.

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and another.

occupation of what they call *scrivening* was not merely incidental to the profession of an attorney, but was carried on in the course of an independent substantive pursuit.

With respect to the other species of trading that has been set up by the petitioning creditor, namely, that of a *banker*,—the only evidence in support of the banking is furnished by an affidavit of a person of the name of *Cox*, who states merely “that he was *informed and believes*” that the bankrupt carried on the business of a banker; and his reason for so believing is, because there are entries appearing in his books of monies received and paid on account of different persons, in the same way as monies are in general received and paid by bankers, and that the books were kept in the same manner as those kept by bankers. The answer to this is, that the bankrupt was the executor of some of those persons; and that the mere fact of his adopting the plan of bankers in keeping his books, for the sake of method or clearness, does not prove that he was himself a banker. Besides, these books are no evidence as against the assignees. [Sir *John Cross*. They are evidence of the mode in which he dealt with the money of his employers.] Even taking that to be so, the evidence as to banking amounts to nothing.

Then, to recur to the alleged trade of *scrivening*. There is no doubt that the same person may unite both the employments of an attorney and a scrivener; but then it must be ascertained in which transaction he was the one or the other; and the greatest judge who ever sat in the Court of Chancery has said, that the policy of the law will not permit him to be both attorney and scrivener in the

same transaction(a). The nature of the business of a *scrivener* was very much discussed before Lord *Redesdale*, *In the matter of Warren*(b); in which case there was an instruction of the employer to lay out his money on interest, an actual laying out, and a charge of the attorney for doing so; but Lord *Redesdale* held, that this case of scrivening might have been incidental to his character of an attorney; and that though an attorney might negotiate occasional loans of money, for which he even received procuration fees, yet that he did not thereby become a *scrivener*. [Sir *John Cross*. What Lord *Redesdale* meant was, that the scrivening was incidental to his character of an attorney in that particular instance. But if there is a general course of dealing as a scrivener, then it is not incidental.] The number of instances will not make the case stronger, any more than in the case of a schoolmaster who sells books to his scholars, as incidental to his occupation of a schoolmaster; it is perfectly immaterial, whether he sells one book or a hundred. It is not by arithmetical progression, but by logical reasoning, that the number of the acts done are to be estimated. *In the matter of Warren* there was decided evidence of scrivening, if there could be any evidence of such a dealing. But the doubt that occurred to the mind of Lord *Redesdale*, as well as to that of Lord Chief Justice *Downes*, was, that the scrivening was only incidental to the occupation of an attorney, and not a substantive occupation in itself. In *Ex parte Paterson*(c), Lord *Eldon* says, "that trading as a *scrivener* does not depend upon the fact, whether the bankrupt has or has not occasionally done acts which a scrivener

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(a) See Lord *Eldon*'s judgment in *Ex parte Malkin*, 2 Ves. & B. 31.

(b) 2 Sch. & Lef. 414.

(c) 1 Rose, 405.

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peculiarly and properly would have done; not upon what he may have done upon one day, and what upon another, but upon his intention generally to get a living by so doing." And though in *Ex parte Malkin* (a), Lord Eldon said, "that he had a notion, that if an attorney, acting to such an extent as to afford evidence of a general intention, received commission for laying out money, as well as fees for drawing and executing conveyances," he would thereby become a scrivener, within the operation of the bankrupt law; yet even in this case, so strongly put by Lord Eldon as to afford evidence of a *general intention* to deal as a scrivener, Lord Eldon added, that he was not sure that his notion was well founded, and he accordingly directed an issue. The issue was tried before Lord Chief Justice Gibbs (b), who in an able charge to the jury explained to them very clearly what course of dealing would make a man a scrivener. "At the present day," his lordship said, "the banker occupies one department of the business of the scrivener, by being the depository of the money, and the attorney the other, by drawing the securities. The banker would not be an attorney, though he were occasionally to fill up bonds for his customers; nor does the attorney become a money scrivener, though on particular occasions he incidentally has the money of his clients to lay out for them. In order to make a man a money scrivener, he must carry on the business of being trusted with other people's money to lay out for them as occasion offers. It is not being sent with the money of his client, or receiving it from the person with whom his client may have previously contracted, that will make an attorney a

(a) 2 V. & B. 31; 1 Rose, 406.

(b) See *Adams v. Malkin*, 3 Camp. 534.

money scrivener. In that part of the transaction, he is no more than a person employed to fetch and carry. Having negotiated the loan and drawn the deeds, his happening to receive and pay the money is incidental to his business of an attorney. Nor, if on one or two occasions money were deposited with him to lay out, would that constitute him a money scrivener; he must be carrying on generally the business of a money scrivener. That must be part of his known occupation. And then his lordship, after referring to Lord *Eldon's* observations in *Ex parte Paterson* (a), adds: "Though an attorney may have incidentally acted as a scrivener, that is not sufficient; though money may have been deposited with him, for which he was afterwards to seek a borrower, a few isolated instances of that sort, occurring in the course of his business as an attorney, would not bring him within the operation of the bankrupt laws." And the jury, upon his summing up, found a verdict for the defendant, thereby affirming that the attorney in that instance was not a scrivener. In the case of *Hutchinson v. Gascoigne* (b), which has been relied on by the other side, the attorney was employed generally as a money agent, and had large sums deposited with him to invest upon securities at his own discretion, being allowed a procuration fee for every sum so placed out by him. The mode of dealing in that case, therefore, came completely within the definition of a money scrivener. But even there Mr. Baron *Wood* observed, that if a man received money as a mere channel to convey it from a lender to a borrower, or from one client to another, deriving his principal profit from drawing the securities,

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(a) *Suprà*.

(b) *Holt, N. P. Rep.* 507.

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and from the business of an attorney and a conveyancer, he could not then with propriety be considered a scrivener. Notwithstanding, therefore, an attorney may unite occasionally the employment of a scrivener, by negotiating annuities and loans, yet when the attorney is the predominant character in these transactions, that is, where the bonds, judgments and warrants of attorney, by which the annuities are secured to the grantee, are prepared in his office, and he charges for them in his bill as an *attorney*, though the annuity commission may be included in these charges,—he will not be subject to the bankrupt law as a scrivener; *Hurd v. Brydges* (a). In the affidavit of *Crooke*, which has been relied on by the respondents to establish the trading, he states that he employed the bankrupt to raise money on mortgage of certain property, and that, besides his charge for preparing the mortgage securities, he charged another sum as a *bonus* or remuneration for procuring the money. We have given them notice to produce the bill of costs in which that charge was made. They have not done so—Why? Because the charge would have been found to be the charge of *attendance*, as an *attorney*. Now, that will not do; for *In re Warren* (b) there was an express charge even for *procuration*, and yet, as it was incidental to his occupation of an attorney, it was held not to be scrivening. The criterion therefore will be, whether the transactions relied on by the other side were primary transactions of the bankrupt for the purpose of seeking his livelihood as a scrivener,—or were they merely incidental to his occupation of an attorney? Three cases have been specified, where it is alleged that

(a) Holt, N. P. Rep. 654.

(b) *Suprà*.

the money was deposited for the purpose of being invested on mortgage, and that part of it was so invested. But in neither of these cases does it appear that there was any charge for procuration; and indeed we have the affidavits of the persons to whom the money was advanced, and who state that there was no charge made on them for procuration. In one case, also, the money was deposited for the express purpose of being lent to a particular person on mortgage.

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 G & M
 and another.

Sir JOHN CROSS.—It seems to me, that a good deal of confusion has arisen as to the nature of the dealing of a money scrivener, which may not be applicable to the present state of the law. By the 21 Jac. 1. c. 19. s. 2., “all and every person or persons that shall use the trade or profession of a scrivener, receiving other men’s monies or estates into his trust or custody,” were liable to be made bankrupt. By this statute, therefore, it was essential that the party should use the trade or profession of a scrivener. Then came the 5 Geo. 2. c. 30. s. 39., which, after reciting that bankers, brokers, and factors are frequently entrusted with great sums of money, and with goods and effects of very great value belonging to other persons, enacted that such bankers, brokers, and factors should be subject to the bankrupt law. The liability therefore of *money scriveners* under the statute of James was thus extended to three other classes of traders receiving men’s money and goods into their trust and custody. Then came the last general act of 6 Geo. 4. c. 16. s. 2., which declares “that all bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men’s monies or estates into their trust or custody” shall be deemed traders liable to become bankrupt. Now

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I have heard of no case having occurred since the passing of this last act of parliament, that confines these words of the act, viz. "receiving other men's monies or estates into their trust or custody" to the mere occupation of a banker, broker, or person using the trade or profession of a scrivener. And it seems to me, that the plain intention of the act is, that whoever receives other men's monies or estates into his trust or custody, for the purpose of gaining a livelihood by the profits arising from the money so deposited, is to be deemed a trader liable to become bankrupt. The cases that have been cited do not appear to me to apply to the construction I put upon the new act of parliament (a); for I do not feel bound to consider it a vital question, whether the party was a banker or broker, or a scrivener, but rather whether he was a person receiving other men's monies or estates into his trust or custody, with a view to make profit in the disposal of them. Now, a money scrivener appears to me to be merely a broker between the borrower and the lender of money; and the ground of the opinion I have formed in this case is, that the bankrupt has here exercised the business of a *money broker*, whether he may be called a banker, or a scrivener. But if I entertained any doubt on the matter as to the trading, I should think that I ought not to annul the fiat,—a course only to be followed, if I had been clearly satisfied of the party not being a trader. After considering the whole case, however, I have no doubt upon the subject, my opinion in favour of the trading being founded on the words of the act of parliament.

Petition dismissed, with costs.

(a) And yet the description of a scrivener is precisely the same in both the acts of 21 Jac. 1. c. 19. s. 2. and the 6 Geo. 4. c. 16. s. 2.

Ex parte JAMES FORD.—In the matter of
JAMES FORD.—

1841.

Westminster,
June 1.

THIS was the petition of the bankrupt to annul the fiat, impeaching both the trading and the petitioning creditor's debt. The fiat issued in October 1838, and described the bankrupt as a "watchmaker, dealer, and chapman." He now swore that he was not a *watchmaker*, but merely a *mender* and *cleaner* of watches. The petitioning creditor was an attorney, and his demand against the bankrupt arose from the costs of an action, in which he was retained by the bankrupt in his professional capacity. The bankrupt stated, that no bill of costs had ever been delivered or taxed; and that the petitioning creditor had agreed only to charge the costs out of pocket, which would reduce the demand considerably below 100*l*. That the object of the petitioning creditor in issuing the fiat was to get rid of a bill in Chancery, which the bankrupt had filed against the petitioning creditor for a specific performance of his contract; and that within six months after the fiat was issued, the bankrupt brought an action at law against the petitioning creditor to try its validity, but that the action had abated by the death of the petitioning creditor, which took place in February 1840.

Where the bankrupt, after the death of the petitioning creditor, presented a petition to annul the fiat, disputing both the trading and the debt, and it appeared that his statement as to the trading conflicted with his deposition on this subject before the Commissioners, the Court refused to annul; more than two years having elapsed since the issuing of the fiat.

Mr. *Parker* appeared in support of the petition.

Mr. *Swanston*, *contra*, objected to the right of the bankrupt to present a petition to annul, on the ground of the delay that had taken place since the fiat was issued.

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Ex parte
FOND.

Sir JOHN CROSS.—I do not think, under the circumstances stated in the petition, that that is any ground of estoppel. But there is this difficulty in the case. The petitioning creditor has proved his debt on his own affidavit; and now, after his death, the bankrupt calls upon the assignees to prove what the petitioning creditor could only prove himself. Has the bankrupt any evidence, besides his own affidavit, to impeach the petitioning creditor's debt?

Mr. *Parker*. There is the evidence of other persons, to prove that the petitioning creditor agreed to charge the bankrupt only costs out of pocket.

Sir JOHN CROSS, having called for the proceedings under the fiat, said, after he had inspected them,—I find that in December 1838 the bankrupt's further examination was adjourned to February 1839, on account of his intention to dispute the fiat. But it also appears in the bankrupt's deposition before the Commissioners, that he acknowledged that he had bought old watches and clocks, and after cleaning and repairing them had sold them for a profit; although he now swears that he sought his living by *mending* and *cleaning* watches only. There is an end therefore to the objection in regard to the trading. And as there is so much conflict between the statements of the bankrupt in his present petition and those in his deposition before the Commissioners, I think I ought not to annul the fiat, after the death of the petitioning creditor and the delay that has taken place in presenting the petition.

Petition dismissed.

Ex parte ADAM FREER SMITH, DAVID SMITH, and CHARLES BUTCHER.—In the matter of DAVID CLARKE.—

1841.

Westminster,
June 1 & 4.

THIS was the petition of trustees under a marriage settlement to be admitted to prove for the sum of 656*l.* 12*s.* 11*d.*

Where a party, at the time of the misapplication of a trust fund by the trustee, was cognizant of the fact, but had then no right or interest whatever to the fund, and afterwards acquired such right, as administrator to the *cestui que trust*: *Held*, that his rights as administrator were not affected by such previous knowledge, on the ground of acquiescence. Where therefore the trustee in such a case became bankrupt, after committing a breach of trust, the administrator of the *cestui que trust* was not prevented from proving for the amount of the interest on the trust fund, which accrued due in the lifetime of the *cestui que trust*.

The petition stated, that by a certain indenture of marriage settlement, dated the 28th February 1825 at Calcutta, and made in contemplation of the marriage of *Alexander Falconer* and of *Josephine Hume*, two life policies of assurance in two insurance companies established at Calcutta were assigned by *Alexander Falconer* to the bankrupt and four other trustees, in trust for *Alexander Falconer* until the solemnization of the marriage; and after the solemnization thereof, upon trust that all sums to become payable by virtue of the policies should be invested in some one of the public securities of the East India Company, or some other good securities real and personal, and to pay the dividends and proceeds thereof to *Josephine Hume*, if she should survive *Alexander Falconer*, during her life, to and for her own sole and separate use and benefit, or to such person as she by writing under her hand should, notwithstanding any future coverture, direct or appoint; and after her decease, then in trust for her children by *Alexander Falconer*; and if no children, then in trust for such person as *Alexander Falconer* should by any instrument in writing attested by two witnesses, or by his last will, direct or appoint; and for want of such appointment, in trust for his next of kin, according to the statute for the

Where the petitioner was summoned and examined by the adverse party before the Commissioner, and stated a part of

his examination in an affidavit in support of the petition: *Held*, that it was not receivable in evidence; 1. Because part of the examination could not be read, without the whole; and, 2. Because no notice had been given to read the examination on the hearing of the petition.

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SMITH
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distribution of intestates' estates. And by the said indenture power was reserved to *Alexander Falconer* and *Josephine Hume* to appoint new trustees, in the room of those dying or desiring to be discharged from the trusts.

The marriage was solemnized on the 2d March 1825.

In 1826 the bankrupt quitted the East Indies, having appointed Messrs. *Fergusson & Co.* his attornies.

In 1829 *John Grant* and *Josiah John Hogg*, two of the trustees, died.

On the 21st July 1826 *Alexander Falconer* died, leaving one son of the marriage, who also died in 1827.

On the 5th September 1827 *Josephine Falconer*, his widow, who had then not attained the age of twenty-one years, intermarried with the petitioner *Adam Freer Smith*, and attained the age of twenty-one on the 13th November 1827.

On the 1st August 1826 the bankrupt, by his constituted attornies, Messrs. *Fergusson & Co.*, received from one of the insurance companies at Calcutta the sum of 12,000 Sicca rupees on one of the policies assigned by the marriage settlement; and on the 2d November 1826 the bankrupt by his said attornies received also from the other insurance company, with whom the other policy was effected, the sum of 60,000 Sicca rupees; and on the 19th February 1827 the further sum of 9159 Sicca rupees on the first mentioned policy. These three sums, making together 81,159 Sicca rupees, were allowed by the bankrupt to remain as a cash balance in the hands of Messrs. *Fergusson & Co.*, and no part was ever laid out in any securities, under the trusts of the will.

The petition alleged, that *Josephine Falconer* was utterly ignorant of business, and unacquainted with the trusts of the settlement, save only that she was entitled to an income from her trustees, which was paid through

the house of *Fergusson & Co.*, and that she had no copy of the deed of settlement.

On the 26th November 1833 the house of *Fergusson & Co.* were adjudged insolvent by the Court for the relief of Insolvent Debtors at Calcutta, when the trust money in their hands amounted to the sum of 79,916 Sicca rupees.

On the 10th December 1835 a fiat was issued against *David Clarke* and his partner *Samuel Gregson*.

On the 1st July 1836 *Josephine Smith*, in pursuance of the power reserved to her by the deed of settlement, appointed the petitioners to be new trustees, in the place of the bankrupt and the two other surviving trustees.

Since the bankruptcy of *David Clarke*, some dividends had been paid by *Fergusson & Co.*'s estate to the trustees under the settlement, whereby the debt provable against *David Clarke's* estate had been diminished.

On the 4th April 1839 *Josephine Smith* died.

On the 10th July 1839 the petitioners obtained an Order that *Adam Freer Smith*, he being the only one of the petitioners resident in England, might, on behalf of himself and the other petitioners, prove against the separate estate of *David Clarke* the balance remaining due of the sum of 80,133 Sicca rupees, equivalent to 8013*l.* sterling, after giving credit for the money received from the estate of *Fergusson & Co.*, and that the amount of any dividends under the proof should be laid out in the purchase of Bank three per cent. annuities in the name and with the privity of the accountant in bankruptcy, in trust for all parties concerned.

On the 8th May last the petitioner *Adam Freer Smith* took out letters of administration to his deceased wife, *Josephine Smith*.

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On the 29th February 1840 the petitioner *Adam Freer Smith*, on behalf of himself and his co-trustees and the parties interested under the settlement, carried in a proof under the fiat; when Mr. Commissioner *Holroyd*, after hearing evidence and counsel on both sides, made the following Order; "Admit the proof for the capital 5354l. 8s. 8d., and also for the interest 656l. 12s. 11d., on account of the life estate of Mrs. *Smith*, without prejudice to the claim of the assignees to reduce the proof of such interest, on the ground of the acts of Mrs. *Smith*. The assignees to establish such right within nine months from this 29th February 1840, and the dividend on the proof of the interest (with the consent of all parties) not to be transferred under the Order of the Court of Review, until after the expiration of said nine months, and the proof of the capital of the said trust funds to be without prejudice to any question which the assignees may, within nine months from this 29th February 1840, raise, as to the beneficial interest in the said capital, and their right to have the proof in respect thereof reduced or wholly expunged, on the ground of the acts of the party who may be decided to be entitled to such beneficial interest."

The sum of 656l. 12s. 11d. was the interest which accrued due between the time of the insolvency of *Ferguson & Co.* and the bankruptcy of *David Clarke*.

In January 1841 an application was made to the Commissioner on behalf of the assignees to reduce the proof, by disallowing the sum of 656l. 12s. 11d., on the ground that the petitioner *Adam Freer Smith* and his deceased wife had full knowledge of the breach of trust committed by *David Clarke* and acquiesced therein. On this occasion *Adam Freer Smith* was examined on behalf of the assignees, when he distinctly negatived any know-

ledge of the breach of trust, or any acquiescence therein. The Commissioner was of opinion, that *Josephine Smith*, as a married woman, had no power to prejudice herself, and that no act of hers, except in accordance with the terms of the settlement, could bind her; and therefore, if the trustees of the settlement were seeking to prove in respect of Mrs. *Smith's* life interest under the settlement for her benefit, that such proof would have stood. But the Commissioner was of opinion, that, in point of fact, the petitioner *Smith* had known and assented to the breach of trust; and that as he, as the administrator of his wife, would be the party entitled to call on the trustees to account to him for the dividends on the proof, in respect of interest which had accrued due in her lifetime, the proof for the interest ought to be expunged.

The grounds on which the judgment of the Commissioner proceeded were, that the petitioner *Adam Freer Smith* was a clerk in the house of Messrs. *Fergusson & Co.* till shortly before their insolvency; that the payments of the interest were made to his late wife by and through them; that there was an account in the books of *Fergusson & Co.* between them and the trustees of the settlement, which showed a balance in favour of the trustees; and that, though the petitioner had no concern with the accounts of the house, he saw, or might have seen, that account, as he might any other account.

The petitioner alleged, that although he was a clerk in the house of *Fergusson & Co.*, and had been placed there by *David Clarke*, he paid no attention to the account, and never examined it, though he might have accidentally seen it. That neither himself, nor his said

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wife, ever read the settlement, before the insolvency of *Fergusson & Co.*, or had any copy of it; and all they knew about it was, that she was entitled to the interest of the money during her life, and that the petitioner had nothing to do with that interest, and that there might be a question about the construction of the settlement, after her death. That neither the petitioner, nor his wife, knew any thing as to the arrangement between *David Clarke* and *Fergusson & Co.* with respect to the trust funds, or any directions they had from *David Clarke* touching the said funds, or how the same were disposed of, or whether they were or were not invested, or whether *David Clarke* had or had not any security for such of the trust monies as were in the hands of *Fergusson & Co.* That the correspondence between *David Clarke* and *Fergusson & Co.* was contained in a private book, which was not open to the inspection of the petitioner, or the other clerks. That, as he never had any interest or right or title to interfere with the said fund, till he was appointed a trustee in 1836, he never in any way interfered in any matter connected with the trust funds. That he never did assent to or acquiesce in the breach of trust committed by *David Clarke*, and that in fact no acts done, or omitted to be done, by him during the lifetime of his wife could affect the right of proof against the estate of *David Clarke* for such interest. That, according to the decision of the Commissioner, there was at the date of the fiat an unquestionable right of proof in the then trustees for the interest, and that such right of proof could not be affected by the subsequent accident, that *Josephine Smith* had since died; that it was to the petitioner *Adam Freer Smith* that letters of administration to her estate had been granted;

and that the petitioners had incurred costs, as trustees, in respect of the said interest.

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Mr. *Swanston*, in support of the petition. The petitioner had no knowledge of the trusts contained in the marriage settlement; there could therefore be no acquiescence on his part in the breach of trust committed by the bankrupt, in omitting to invest the trust money in real or personal securities. Neither could Mrs. *Smith* be bound, as a married woman, by an act in derogation of the trusts. The Commissioner was of opinion, that though the wife was not barred of the right of proof for the interest by any act of her's, yet the husband was bound by some act of his own.

Sir JOHN CROSS.—It appears, that the ground of the Commissioner's judgment was this: that, although the wife at the time of her death was entitled to this money, yet the husband, who was aware of something before he became administrator to his wife, was bound by his knowledge of that fact. We had better hear the other side.

Mr. *Anderdon*, *contrd.* As the interest was paid to the wife in her lifetime through the house of Messrs. *Fergusson & Co.*, and the petitioner, her second husband, was a confidential clerk in that house, we have a right to infer that both the one and the other had knowledge of the breach of trust. And, having had knowledge of the breach of trust, the petitioner has now no right to prove for the interest. Where the *cestui que trust* has derived, knowingly, benefit from the breach of trust, he is not entitled to call his trustee to account for

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any consequential damages occasioned by such breach of trust. This appears clearly from the decision in *Nail v. Punter (a)*. In that case stock was settled on a wife, for her separate use, for life, with a power of appointment by will. The trustees, at the request of the husband and wife, sold out the stock, and paid the proceeds to the husband, who afterwards became bankrupt. The wife filed a bill to compel the trustees to replace the stock, and obtained a decree, under which the trustees transferred part of the stock into Court, and they were allowed time to transfer the remainder. The wife died, having by her will appointed the stock to her husband, and appointed him also her executor. He filed a bill of revivor and supplement against the trustees and his assignees, claiming the stock under the appointment, and praying the same relief as his wife might have had; and the Vice-Chancellor of England was of opinion, that, as the plaintiff had already, through the means of a breach of trust, received the whole benefit of the fund, it would be contrary to plain justice, that he, who had had the money once, should have it a second time; and that the circumstance that he was his wife's executor did not vary the case. So here, the petitioner *Smith*, who is his wife's administrator, having received a benefit from the trust fund being in the hands of Messrs. *Fergusson & Co.*, cannot now claim interest, which is in the shape of damages, against the trustee, for permitting it to remain in the hands of *Fergusson & Co.*, instead of investing it on real or personal security.

Mr. *Swanston*, in reply, proposed to read the examination of the petitioner *Smith*, which was taken before

(a) 5 Sim. 555.

the Commissioner and set forth in the petition, on the ground that he was on that occasion summoned by the other side to be examined, and gave evidence against himself. It therefore becomes their examination.

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Mr. *Anderdon* objected to its being read, as there was only part of the examination set forth in the petition, and no notice had been given to read the examination.

Sir JOHN CROSS.—If any part of the examination is to be read, the whole ought certainly to be read; and as no notice has been given by the petitioner of his intention to read it, I think it is not receivable.

Mr. *Swanston* then put in an affidavit of the petitioner, which stated the particulars of his examination before the Commissioner, and that he then distinctly negatived his knowledge of the breach of trust.

Mr. *Anderdon* objected.

Sir JOHN CROSS thought that the objection must prevail, and that the examination itself could only be read on notice.

Mr. *Swanston* then read that part of the affidavit of *Smith*, which stated that he had no knowledge whatever how the money was deposited with Messrs. *Fergusson & Co.*, and whether it was invested in security, or not. Who are the parties to this petition? The petitioners are the trustees under the marriage settlement; and *Smith*, the husband, was not appointed a trustee, until

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and others.

more than two years after *Fergusson & Co.* were adjudged insolvent. There is a breach of trust, and there are parties competent to prove. How can any matter *ex post facto* bind the party? How can it be said, that a party, who was a stranger at the time to the trusts of the settlement, and had no interest whatever in the fund that was subject to those trusts, is to be bound by any knowledge he had then, because he afterwards acquires an interest. It is unnecessary to cite authorities, to show, that when a man has no right, he will not be bound by any knowledge that may affect such right.

Sir JOHN CROSS.—The whole question in this case appears to me to turn upon this single fact—was the petitioner *Smith*, either in his character of husband, or trustee, cognizant of the breach of trust before the bankruptcy of *Clarke*? Now, as far as I can discover from the evidence, it was not till the actual failure of *Clarke*, that the breach of trust was known. For, even supposing that the *cestui que trust* knew that the trust money was deposited with Messrs. *Fergusson & Co.*, there is no evidence that either she, or *Smith*, knew it was deposited with them without any security. But, putting the case still stronger, and admitting that *Smith* knew that *Fergusson & Co.* had given no security for the trust fund, the utmost that can be said, is, that *Smith*, who had then no right or interest whatever in the fund, did not in his then position object to its being so deposited. I think the Commissioner was mistaken in his conclusion from the evidence, if that evidence was properly before him. But I also think, if the petitioner had any knowledge of the breach of trust, before he had any interest in the fund, that such knowledge would not

bind him. I am therefore of opinion, that the proof ought to be restored.

1841.

Ex parte
SMITH
and others.

ORDERED as prayed; the costs of both parties to come out of the estate.

Ex parte YATES.—In the matter of PEAKE.—

Westminster,
June 4.

THIS was a petition of the trustees under a trust deed to annul the fiat, which was sued out so far back as the 20th June 1840 for the purpose of overreaching the trust deed. The fiat, however, had never been opened; as the great body of the creditors had since consented to come in under the trust deed, and the petitioning creditor also consented to the present application. The trustees had, in pursuance of this arrangement, sold all the personal estate of the bankrupt, and had contracted for the sale of the real estate; but they could not make a good title to the purchaser, unless the fiat was annulled.

When a fiat will be annulled to give effect to a trust deed.

Mr. *Anderdon* appeared in support of the petition.

The COURT made the ORDER as prayed, upon the production of the consent of the petitioning creditor.

1841.



Westminster,
June 4.

An agreement, in writing, accompanying the deposit of title deeds, to secure a specific sum, may be extended as a security beyond that sum by a subsequent verbal agreement.

Ex parte THOMAS NETTLESHIP.—In the matter of
JOHN BURKILL.—

THIS was a petition of the public officer of the Lincoln and Lindsey Banking Company, as equitable mortgagees, for the usual Order. The deposit of the title deeds was accompanied with a memorandum in writing, dated the 19th December 1838, which stated that the deposit was made by the bankrupt for securing past and future advances, not exceeding 2000*l.*, and that the bankrupt thereby agreed, on request, to execute a legal mortgage for securing that sum. On the 30th January 1840 the bankrupt verbally agreed with the banking company, that the title deeds deposited should be a security for any additional advance beyond the sum of 2000*l.* On the 25th November 1840 the fiat issued, when the bankrupt was indebted to the banking company in a balance of 2680*l.* On the 28th November the bankrupt executed a legal mortgage to the company, without giving them any notice of the issuing of the fiat.

In answer to the statements in the petition, the bankrupt swore that he never gave a written memorandum, or agreed to extend the advance beyond the 2000*l.*; but he was contradicted by several witnesses.

Mr. *Swanston*, and Mr. *W. R. Ellis*, in support of the petition. The only question is, whether the deposit of the deeds can be considered to extend as a security beyond the sum of 2000*l.* If the Court is satisfied upon the evidence, that the bankrupt obtained further credit from the bank, on the understanding that the deposit was to continue a security for any further advances, then we are entitled to charge the estate with a lien for

such further advances, as well as for the sum of 2000*l*. In *Ex parte Langston* (a) Lord *Eldon* said, that, after a deposit of deeds to charge an estate, it is not to be inferred that further advances are not to be charged, if made out by the oath of the party uncontradicted, that the additional sum is to be a further charge; and that it could not be denied, that the representation of a man borrowing money may constitute an express agreement by parol. And in *Ex parte Kensington* (b) his Lordship admitted, that in previous cases he had gone the length of stating, that where the deposit originally was for a particular purpose, that purpose may be enlarged by a subsequent parol agreement. In the subsequent case also of *Ex parte Lloyd* (c) it was expressly decided, that where title deeds are deposited by way of security upon a verbal agreement, the deposit may be extended by a subsequent verbal agreement.

1841.

Ex parte
NETTLESNIP.

Mr. Anderdon, contra. It is contrary to the principle of all the cases, to extend the operation of a formal written instrument by parol evidence. Thus, it is a settled rule, that you cannot extend the security of a legal mortgage (d) by a subsequent parol agreement. And Lord *Eldon* has more than once said, when these questions have come before him, that, after the Statute of Frauds had required that an interest in land must be conveyed by some instrument in writing, he could never conceive upon what principle courts of equity could have taken upon themselves the authority to abrogate an express act of parliament (e). As to the cases which have been

(a) 1 Rose, 26.

(b) 2 Ves. & B. 79; 2 Rose, 138.

(c) 1 G. & J. 389.

(d) *Ex parte Hooper*, 2 Rose, 328.

(e) See *Ex parte Whitbread*, 1 Rose, 299.

1841.

Ex parte
NETTLESHIP.

cited in support of this petition, in *Ex parte Langston* (a) there was no contract in writing at the time of the deposit, but a mere verbal agreement; and the only question in *Ex parte Kensington* (b) was, whether the lien on deeds deposited with bankers for advances would continue, after a change in the firm by the introduction of a new partner; and Lord *Eldon* held, that the continuance of the possession of the deeds by the new firm amounted to a re-delivery of them by the bankrupt. The same point also, and nothing more, was decided in *Ex parte Lloyd* (c), and Sir *John Leach* on that occasion went beyond Lord *Eldon*, in saying that the effect of the judgment in *Ex parte Kensington* (b) was, that an agreement, written or verbal, not being by deed, may be extended by parol.

Mr. *Swanston*, in reply, was stopped by the Court.

Sir JOHN CROSS.—The first point that has been contended for by the counsel for the respondents is, that where there is a written agreement accompanying a deposit of title deeds to secure the advance of a specific sum, the security cannot afterwards be extended by a parol agreement. But I can find no such rule of law. It is very true, that the Statute of Frauds declares that no interest in lands shall pass, except by agreement in writing. But it has been over and over again decided, that a mere deposit of deeds, without any note in writing, is enough to create an equitable mortgage. If the point had been new, it might have been open to discussion; but the cases cited have concluded it. I am therefore

(a) 1 Rose, 25.

(b) 2 Ves. & B. 79; 2 Rose, 136.

(c) 1 G. & J. 389.

clearly of opinion, that, in point of law, an agreement in writing for an equitable mortgage may be extended by a subsequent parol agreement. The only question therefore that remains to be considered in this case is, whether there was, in fact, such subsequent agreement. I own it would have been more satisfactory, if there had been some evidence in writing of the extension of the original agreement. But it is distinctly sworn by several witnesses, that on the 30th January, when the manager of the bank complained that the bankrupt's account was considerably overdrawn beyond the 2000*l.*, the bankrupt agreed that the bank should hold the deeds as a security for any advances beyond that sum; and this is quite probable and consistent with the other facts of the case. I am of opinion, therefore, that the evidence does establish a subsequent agreement to extend the original security. But, as there has been some negligence on the part of the bank, I think the Order should be without costs.

1841.

 Ex parte
 NEITLSHIP.

Common ORDER.

Ex parte DEAN.—In the matter of DEAN.—

THIS was a petition of the bankrupt to annul the fiat, on the ground that he had committed no act of bankruptcy. It appeared, that a meeting of his creditors had been held at the office of the solicitor who sued out the fiat, at which the bankrupt attended to explain the state of his affairs. After he had made his statement, and

Westminster,
 June 5.

A trader, having attended a meeting of his creditors, is desired by them to withdraw until they can come to some resolution on the state of his affairs; he accordingly retires into an

outer room, where he is served with a copy of a writ; upon which he abruptly takes his hat and leaves the place of meeting altogether, not returning until the expiration of an hour, when the meeting had broken up. *Held*, that his thus absenting himself amounted to an act of bankruptcy.

1841.

Ex parte
DEAN.

been interrogated by some of his creditors, he was requested to withdraw, until the creditors had come to some resolution as to what was best to be done. He accordingly withdrew from the inner to the outer office, leaving his hat in the former room. During his stay in the outer office he was served with the copy of a writ, upon which he sent the clerk into the inner office for his hat, and went away, but returned in an hour; at which period, however, the meeting had broken up.

Mr. *J. Russell* appeared in support of the petition.

Mr. *Swanston*, and Mr. *Bacon*, *contrà*, contended, that the withdrawing of the bankrupt altogether from the place of meeting, without waiting until he was called in again to be acquainted with the resolution of his creditors, was a sufficient act of bankruptcy; as the circumstances under which he absented himself showed that it was for the purpose of avoiding his creditors, and through fear of being served with process. They also said they would rely on another act of bankruptcy, founded on the fraudulent preference of a creditor.

Mr. *J. Russell*, in reply. The bankrupt only withdrew from the meeting, at the request of the creditors; and was not told by them that he was expected to return. The circumstance of his sending the clerk for his hat into the inner room, where the creditors were assembled, showed that there was no intention of concealing the fact of his leaving the office for a temporary purpose, and the fact of his return in an hour's time also proves that he had no intention to avoid his creditors. In

Vincent v. Prater(a), where a trader absented himself from his house, where his creditors were assembled, to avoid irritation and harsh language, this was held to be not an act of bankruptcy, as his absence was not with intent to delay his creditors.

1841.
~~~~~  
Ex parte  
DEAN.

Sir JOHN CROSS.—I think the circumstances which have been detailed show, clearly, that the bankrupt was expected to return to the room in which the creditors were assembled; for he was merely desired to withdraw, until they could come to some resolution on the state of his affairs; and the circumstance of his leaving his hat in the room shows, also, that he was conscious that his presence would be again required. He is, however, contrary to his expectations, served with the copy of a writ in the outer office, which induces him to send the clerk in for his hat, and abruptly to leave the office, not finding it so agreeable to return, until his creditors had dispersed. It appears to me, that his thus absenting himself from the place of meeting amounts to a clear act of bankruptcy.

Petition dismissed.

(a) 4 Taunt. 603.



Ex parte FLETCHER.—In the matter of PROUD.—

Westminster,  
June 5.

THIS was a petition praying that a party might be committed for contempt, for taking forcible possession of the bankrupt's stock in trade and effects whilst in the custody of the messenger.

Where a party took forcible possession of the bankrupt's effects, whilst in the custody of the messenger, but, finding he

had done wrong, gave up the possession again,—the Court, on a petition to commit him for a contempt, only ordered him to pay the costs of the petition.

1841.

Ex parte  
FLETCHER.

Mr. *Swanston*, and Mr. *Anderdon*, in support of the petition, urged that the possession was taken by the party complained against, in avowed defiance of the authority of this Court; for he must have known that the person dispossessed was the officer of the Court.

Mr. *Bacon*, *contrà*, did not question the jurisdiction of the Court to commit for a contempt of its officer, or its process; but the party complained of was ignorant of his own authority, thinking, that as he had a prior claim to the bankrupt's goods, he had a right to seize them, though in possession of the messenger. As soon, however, as he was satisfied of his error, he withdrew from the possession of the property. The Court, therefore, will not under these circumstances commit the party; and the only question is, whether it will enforce the payment of costs by him.

Sir JOHN CROSS said, that, without going into a long discussion of the facts of the case, there had been a gross contempt committed, by a forcible dispossession of the officer of the Court, who, it appears, had been in possession of the property for two months previously. It is now said by his counsel, that he was shortly convinced of his error, and gave up the property to the messenger. But the least I can do is, to make him pay the costs of this petition.

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1841.



Westminster,  
June 5.

Ex parte ROSE.—In the matter of ROSS.—

THIS was a petition of the executor of an equitable mortgagee of a policy of assurance on the bankrupt's life, for the usual Order. It appeared, that the policy in question was effected in the year 1834 with a mutual assurance company; that the bankrupt continued to pay the premium on the policy; that notice of the transfer of the policy was not given until the 19th March 1841, which was after the act of bankruptcy, that having been committed on the 3d March; and that the fiat issued on the 24th March.

Although no notice is given to an insurance office of the deposit of a policy with an equitable mortgagee, *semble*, that it is not a case of reputed ownership, unless some evidence is offered that the bankrupt was still reputed to be the owner.

Where the policy is effected by the bankrupt with a mutual assurance company, in which all the insurers are considered as copartners, such a notice is not necessary.

Mr. *W. R. Ellis*, in support of the petition, relied on the 2 & 3 Vict. c. 11. s. 12., which declares that all conveyances by any bankrupt, *bonâ fide* made and executed before the date and issuing of the fiat, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person to whom the bankrupt so conveyed had not, at the time of such conveyance, notice of any prior act of bankruptcy by him committed. Now, in this case, there is no pretence that the party had any notice of the act of bankruptcy committed on the 3d March.

Mr. *Swanston*, *contrâ*. The act of parliament that has been relied on by the petitioner relates only to *conveyances*, and the protection of *purchasers*. Here there was no conveyance or purchase (a). The party, therefore,

(a) But see 2 & 3 Vict. c. 29, which renders valid all *dealings* and *transactions* with the bankrupt, if the party so dealing had no notice of any prior act of bankruptcy. And see *Ex parte Smith*, *re Styant*, *post*.

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ROSE.

with whom the policy was deposited, having omitted to give notice of such deposit to the office until after the act of bankruptcy, the bankrupt continued the reputed owner; and he was, in point of law, the actual owner. The Courts have always held, that where a bankrupt has once been the true owner of property, and has not transferred the possession of it, whatever secret disposition he may have made, he is still to be accounted the reputed owner. Now, the bankrupt in this case continued to pay the annual premium on the policy; no entry of any transfer of the policy was made in the books at the office; and the insurance company must therefore have still supposed him to be the real owner of the policy.

Sir JOHN CROSS.—Reputed ownership is entirely a question of fact. In the present case, the possession of the policy itself was transferred to the testator, to secure the repayment of a loan of money. Then, what possession, order, and disposition, has the bankrupt since had of this policy of assurance? In one word, what dominion has he ever since had over it? I cannot bring myself to think, that this is a case of reputed ownership, without some evidence of the fact, that the bankrupt *was* the reputed owner. In order to constitute *reputation* of ownership, surely some proof should be required from persons who knew him once to be the owner, and believed him still to be so. There is, however, another point in this case, namely, that this is a mutual assurance office; and therefore, if notice of the transfer was material, notice must, under these circumstances, be presumed.

Common ORDER.



1841.

Ex parte WHITWORTH and others.—In the matter of

COOKE.—

*Westminster,  
June 5.*

THIS was the petition of creditors, holding various securities for their debt, to stay the bankrupt's certificate. The petition stated, that at the date of the fiat the sum of 6000*l.* was due to the petitioners from the bankrupt, besides interest; that in the year 1838, a policy of assurance had been deposited with the petitioners by the bankrupt, and in 1839 there were also two different deposits of the title deeds of certain freehold property; that these securities had been valued at the sum of 4200*l.*, so that there would be a balance of 2800*l.* still owing to the petitioners, after deducting the value of the securities; that the debts proved under the fiat amounted to 1900*l.*; and that the balance therefore claimed by the petitioners would much more than turn the bankrupt's certificate.

The petitioners also alleged, that the bankrupt had involved them in litigation with other parties, by giving the latter cognovits on their suing out elegits against the property, on which the petitioners had a lien. It appeared, however, from the statement of the bankrupt, that upon a great part of the account depending between him and the petitioners, the bankrupt was only secondarily liable, and in the nature of a surety; that every one of his creditors had signed his certificate, except these petitioners; and that this petition was only presented the very day before the bankrupt's certificate would have been allowed in due course of law.

Where all the creditors, except the petitioners, had signed the bankrupt's certificate, and they, on the day before it would have been allowed in due course of law, presented a petition to stay it, on the ground that the amount of their debt, after deducting the value of the securities held by them, would turn the certificate, and that they had been involved in litigation and expense in establishing the validity of their securities; but it did not appear that the bankrupt was a party to such litigation, or had occasioned any delay to the petitioners; the Court refused to stay the certificate.

Mr. Swanston, and Mr. Keene, in support of the peti-

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WHITWORTH  
and others.

tion. The sum of 1100*l.* would be sufficient to turn the bankrupt's certificate; but we say, that there will be 2800*l.* owing to the petitioners, after giving credit for the full value of the securities. The other side rest their case on a charge of usury, because the petitioners have charged postage and commission, besides interest, in their account with the bankrupt. But this charge of usury will appear to be without any foundation, when the account is properly examined. In staying a certificate, the Court will always exercise a discretionary power on the subject, and does not sit with mere ministerial functions, to see that the requisites of the certificate have been observed. This doctrine was laid down by Sir *J. Cross* in *Ex parte May* (a), where there appeared to have been dealings to a great amount between the petitioner and the bankrupt, and the debt due to the petitioner was stated to be as large as those of all the other creditors put together; and, under these circumstances, Sir *J. Cross* said that the Court ought to pause, before it confirmed the certificate. We only ask the same thing in this case, and that the Court will merely postpone the allowance of the certificate, until the petitioners can prove for the balance due to them, after deducting the value of their securities.

Mr. *Anderdon*, and Mr. *Hall*, appeared on behalf of the assignees.

Mr. *J. Russell*, for the bankrupt. The Court will never stay a certificate, when the petition is presented under such circumstances as these, where every creditor but the petitioners have signed the certificate; and it

(a) *Mont. & C.* 29; 3 *Deac.* 382.

cannot be ascertained,—till the petitioners have realized their securities, and an account is taken between them and the bankrupt,—whether the latter owes them a single farthing; for the bankrupt swears that the securities held by the petitioners will produce twenty shillings in the pound on the amount of their debt. He was then stopped by the Court.

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and others.

Mr. Keene, in reply. There is enough in this case to induce the Court to pause, before it confirms the certificate; in order that there may be an examination of the accounts between the petitioners and the bankrupt, and that the conduct of the latter may be properly inquired into. The bankrupt, by giving cognovits to other parties who sued out elegits on his property, has involved the petitioners in an expensive litigation to establish their prior lien.

Sir JOHN CROSS.—I cannot discover any circumstances in this case, from which any improper conduct can be imputed to the bankrupt, so as to induce the Court to refuse him his certificate. The litigation that has been complained of appears to have been caused by parties, over whom the bankrupt had no control. All the rest that is known is, that this unfortunate gentleman has got his certificate signed by all his creditors, except the one who now holds out. This shows the general approbation that was entertained by them of his conduct. The petitioners allege, that they have only presented this petition under very special circumstances, which have caused them much expense and delay. This may be all true; but the bankrupt is not a party to the inconvenience which they allege to have sustained. I think, therefore, that I cannot, with



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and others.

any degree of justice to the bankrupt, stay this certificate; and that the petitioners must pay him the costs of this petition.

Petition dismissed with costs.

Ex parte JAMES HENRY MACKEY, NATHANIEL JAMES WHITE HOLT, and ALEXANDER AUGUSTUS MACKEY.  
—In the matter of WILLIAM MORRISON.

Westminster,  
June 7.

A London firm advance money to a merchant, who is about to make a consignment to their correspondents in Calcutta, and they take as a security the bill of lading, which they send to their correspondents with an account of the transaction, and a direction for the latter to remit the return proceeds to the merchant, through them. The correspondents sell the goods, and remit directly to the merchant a bill of exchange drawn upon the London firm for the full amount of the proceeds in the following form, "Pay through your good selves &c." The bill of exchange is received by the assignees of the merchant, who becomes bankrupt before its arrival. *Held*, that they are bound to give it up, on being paid the difference between the proceeds of the sale, and the advance made to the bankrupt, and that the London and Indian firms might properly join in presenting a petition to have the bill delivered up.

THE petitioners *James H. Mackey* and *N. J. W. Holt*, who carried on business in London as copartners, were the agents and correspondents of a firm trading at Calcutta, under the name of *J. Mackey & Co.*, in which last mentioned firm the petitioner *Alexander A. Mackey* was a partner. The petition, so far as regarded *Alexander A. Mackey*, was presented on behalf of himself and his copartners. It appeared, that the bankrupt applied to the London firm, as the agents and correspondents of the Calcutta firm, and proposed to make a shipment of stationery to the latter firm for sale on his account and risk, on having an advance made him by the London firm of one half of the invoice price, such advance to be repaid out of the return proceeds of the goods which were to be remitted or consigned by the Calcutta firm to the London firm for that purpose. The petition stated it to be the custom of trade, that where consignments of goods are made through a merchant to his correspondents abroad, and advances are made by the merchant to the consignor, the advances are to be secured and paid out of the return

proceeds of the goods, and that the London and Indian firms might properly join in presenting a petition to have the bill delivered up.

proceeds, which are to be remitted or consigned to the merchant by his correspondents for that purpose. The petition stated, that the London firm, relying upon the above arrangement, and also upon the aforesaid custom of trade, acceded to the proposal of the bankrupt, and advanced him one half of the invoice price of the goods, which he shipped to the Calcutta firm; he having previously delivered to them the invoice and bill of lading, which they transmitted to the Calcutta firm with the following letter.

" London, May 28th 1840.

" Accompanying is the bill of lading for stationery shipped by Mr. *Wm. Morrison* per *Owen Glendower* to your address, costing per his invoice annexed 457*l.* 16*s.* 9*d.* We advanced this gentleman on this shipment 228*l.* 18*s.* 4*d.*; you will please sell on arrival, and remit through us as he may direct."

The Calcutta firm sold the consigned goods, transmitted the accounts of the sales to the London firm, as well as to the bankrupt, and sent to the latter a letter dated December 17th 1840, containing the following passage. " We have none of your favours to reply to. We inclose account sales stationery, ex *Owen Glendower*, netting *£*. 2502.6. brought to a point by our draft favouring you, payable through our friends Messrs. *Mackey, Holt & Co.* for 262*l.* 16*s.* 2*d.*"

The draft mentioned in the letter, and inclosed in it, was as follows:

" No. 234 exchange per sterling 262*l.* 16*s.* 2*d.*

Calcutta, December 16th 1840.

" Ten months after date of this our first of exchange (second and third of same tenor and date being unpaid), please pay to Mr. *William Morrison*, through your good

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selves, or order, the sum of 262*l.* 16*s.* 2*d.* sterling value received, and place the same to account 'general,' being in full of proceeds of stationery *ex Owen Glendower*.

*J. Mackey & Co.*

To Messrs. *Mackey & Co.*"

Before this letter reached England, the fiat was issued, dated January 26th 1841, and the letter was received by the assignees, who presented the draft inclosed in it to the London firm, requiring of them an absolute acceptance of the draft. The London firm refused to comply with this demand, and required that the draft should be delivered up to them, on their paying the balance of the amount for which it was drawn, after deducting from that amount the sum of 228*l.* 18*s.* 4*d.* advanced by them to the bankrupt, for which they claimed a lien on the bill as the return proceeds of the goods; insisting, that as to those proceeds the assignees were trustees for the London firm, as the bankrupt would have been if no fiat had issued. On the assignees refusing to give up the bill, the present petition was presented, for a declaration that the London firm were entitled to have the sum of 228*l.* 18*s.* 4*d.*, advanced by them, reimbursed and paid to them out of the sum of 262*l.* 16*s.* 2*d.*, the amount of the return proceeds, and to have the draft for that amount applied for that purpose as against the assignees, the petitioners offering to pay the assignees the balance; and that the bill might be delivered up to the London firm; and that until such delivery the assignees might be restrained from proceeding upon it against the Calcutta firm.

Mr. *Swanston*, and Mr. *Anderdon*, in support of the petition. The form of the bill of exchange itself shows

what was to be the mode of adjusting the accounts between the London firm and the bankrupt; for the expression "pay through your good selves," which is not the common form employed in such instruments, can have no other meaning than that the London firm were to deduct from the amount for which the bill was drawn the sums advanced by them on the security of the return proceeds. And, independently of this circumstance, the understanding between the parties, whether arising from express agreement, or by the usage of trade, together with the handing over by the bankrupt of the bill of lading to the London firm, and the transmission of it by them, with notice of the agreement, to the Calcutta firm, would be quite sufficient to give the London firm a valid lien on the return proceeds for the amount of their advance, and to constitute the bankrupt, to the extent of that advance, a trustee of the proceeds, if they had reached him, for the London firm. If the return proceeds had consisted of goods, instead of a bill of exchange, it would have been impossible to raise a question on the subject (a).

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Mr. *Curwood*, and Mr. *Bovil*, for the assignees. The petitioners have not shown, nor can it be shown, that the expression which they rely upon in the bill of exchange has any such meaning among merchants as that which they attribute to it; and it is a meaning, which the words in their ordinary signification by no means import. It would have been easy to have said, "Give credit in account," if that had been what was intended by the parties; and then the instrument would

(a) See *Ex parte Flower*, 2 M. & A. 224; 4 Deac. & C. 449; and *Ex parte Copeland*, 2 M. & A. 177; 3 Deac. & C. 199.

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not have been, as it now is, negotiable. Next, with regard to the agreement, it may be true, that if the bill had been remitted directly to the London firm, they might have had a lien upon it; but there must be possession, to constitute lien; and if, instead of remitting *through* the London firm, according to their directions, their Calcutta correspondents chose to remit directly to the bankrupt, so as to deprive the London firm of their security, or the return proceeds, that may be a very good ground for proceedings by the London firm against their correspondents, but is no reason why they should take more than their proportionate share of the bankrupt's estate. This consideration proves, also, that the petition is bad, on account of the misjoinder, as petitioners, of parties who have adverse interests. It is also multifarious; for the relief sought by the Calcutta firm, against the consequences of their own act, is perfectly distinct from that prayed for by the London firm.


Mr. *Swanston* was not called upon to address the Court in reply.

Sir JOHN CROSS.—This is a question of the plainest kind among men of business, to whom it would be a matter of surprise that it should have led to so long a discussion among lawyers. The bankrupt made a consignment through a London house, which advanced 228*l.* on the value of the goods, and in part payment for them. The goods went out to India, but produced less than was expected; instead of being 400*l.*, the proceeds were no more than 262*l.* Of this amount 228*l.* had already been paid; and the whole question is what remains due to the consignor? If there had been no

bankruptcy, it would have been impossible to start a doubt upon the subject. The Indian house had been apprised that the London house had paid 228*l.*; and therefore, if the Indian house had drawn for 34*l.* in favour of the bankrupt, it would have been all that he was entitled to. Instead of doing so, however, the Indian house, acting consistently with the forms of business, remit a bill for the whole amount to the consignor; but they introduce into the bill an expression, which, it has been argued, has no meaning, but which obviously means, "pay through the account between you and the consignor on this subject," pointing plainly to the advance already made. If therefore the London house had written on the bill "accepted for 34*l.*," that would have been sufficient. And if the present holders brought an action against the drawers of the bill, all they could recover would be 34*l.* It is true, that if the assignees negotiated the bill, that would be a fraud against which the drawers would have no remedy except against the assignees, but this consideration does not appear to affect the question. I think, therefore, that on payment of the balance, the petitioners are entitled to have the bill delivered up. It does not appear to me that the petition is multifarious, or that the petitioners have inconsistent claims in respect of the subject of it.

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The ORDER was, that the bill should be delivered up to the petitioners, on their paying 34*l.* to the assignees. Costs out of the estate.



1841.

*Westminster,  
June 8.*

Commissioners are empowered by an act of parliament to levy rates and duties on vessels entering a harbour, and also tolls on vessels navigating a river communicating with the harbour, and they are required to apply the rates and duties in the improvement of the harbour, and the tolls in the improvement of the river. They deposit the monies received by them with one of their number, who is a banker, and acts as treasurer, and the accounts and drafts relating to the harbour and river are separated and distinguished from each other. The banker having failed; held, that a debt due from him on one account might be set off against a debt due to him on the other; and that the assignees might be restrained from proceeding against the Commissioners to recover the latter debt, although the set-off would furnish a good legal defence.

Ex parte PEARCE.—In the matter of LANGMEAD.

THIS was the petition of the clerk to the commissioners appointed under an act of parliament of 6 Will. 4. entitled “An Act for Improving, Maintaining, and Regulating the Harbour of Teignmouth, and the Navigation of the River Teign in the County of Devon,” and it prayed for an injunction to restrain the assignees from prosecuting an action against the commissioners for a debt due from them to the bankrupt, on the ground of there being a larger sum due from the bankrupt to them.

By the provisions of the act certain commissioners therein named, and of whom the bankrupt was one, were authorized and empowered to improve the navigation of the river Teign, and also to improve the harbour of Teignmouth, and for that purpose to levy rates and duties on vessels and goods entering the harbour, and certain tolls on vessels and their cargoes navigating the river; and they were required to apply the monies arising from the rates and duties in the improvement of the bar and harbour of Teignmouth, and the monies arising from the tolls to the improvement of the navigation of the river; they were also empowered to borrow money at interest to an amount not exceeding the sum of 12,000*l.* in the whole, upon the security of the rates and duties, or of the tolls granted by the act; and it was also enacted, that the commissioners might sue or be sued in the name of their clerk for the time being.

At the time of the passing of the act, the bankrupt carried on business as a banker at Teignmouth, in copartnership with one *Robert Jordan*, who was appointed treasurer to the commissioners. The funds of

the commissioners consisted of monies arising from the harbour and river dues under the act, and of loans, of which some were charged exclusively upon the harbour dues, and others exclusively upon the river dues; and these monies were paid to the treasurer, (who allowed interest on the balances from time to time in his hands), and were by him deposited in the banking house of "*Langmead and Jordan*." The account of sums received in respect of the harbour was, by the direction of the commissioners, kept separate from the account of sums received in respect of the river; there being in the treasurer's account book two accounts, headed respectively, "No. 1. Harbour Account," and "No. 2. River Account." The payments were made by the treasurer on drafts drawn by the commissioners, and if the money for which the draft was given was an expenditure on the harbour, the draft was headed "Harbour," but if it related to expenditure on the improvement of the river it was headed "River." The drafts were presented to the treasurer at the banking house and were paid by him there, or by the clerk of the banking firm. The treasurer, *Robert Jordan*, having died in November 1837, the banking business at Teignmouth was carried on by the bankrupt on his sole account, and in his name alone; and no other person was appointed treasurer, in the stead of *Jordan*; but the monies received on account of the commissioners were paid into the banking house, and the payments made on their account were placed to their debit by the bankrupt in the account book, in the same manner as previously to the death of *Jordan*.

At the date of the fiat, the balance of the harbour account was 1414*l.* 5*s.* 8*d.*, in favour of the commissioners; and the balance of the river account was 293*l.* 4*s.* 6*d.*, in

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favour of the bankrupt. No proof had been tendered on behalf of the commissioners, in respect of the debt due to them from the bankrupt; but the assignees having commenced an action for the balance due from the commissioners on the river account, the present application was made to restrain further proceedings in it and for an account, with liberty to prove under the fiat for what should be found due to the commissioners.

*Mr. Russell*, for the petition. The Court will not allow the assignees to proceed, but will assume a jurisdiction, for the purpose of protecting the estate from wasteful expenditure; *Ex parte Clegg* (a).

*Mr. Swanston*, and *Mr. Serjt. Manning*, for the assignees. This is an application for an injunction on grounds, which, if valid at all, would furnish a good defence at law. Such grounds have never been held sufficient to warrant the interposition of a court of equity by way of injunction, nor will the Court restrain the assignees from asserting their legal right, on the ground of expense to the estate; there being no reason for supposing that the petitioner is a better protector of the estate, than those who are chosen by the creditors to protect it. [*Sir John Cross*. As to the equity of the case, it is not a naked question between party and party. The petitioner is one of several *cestui que trusts*, who complains that the trustees are carrying on a wasteful improper suit against some of the *cestui que trusts* to the prejudice of the general estate.] The estate would not be prejudiced; as the assignees cannot charge it with the costs of an im-

(a) 1 M. & A. 91.

proper action; and whether the action is an improper one, or not, is a question to be brought before the officer of the Court first and afterwards, if necessary, before this Court itself. In *Ex parte Clegg*, the case was one of account, a clear subject of equitable jurisdiction. Then, with regard to the merits of the case; the commissioners are trustees for two distinct purposes: one for improving the river, and the other for improving the harbour and for repairing the boundaries between the river and harbour. They kept their accounts with the bankers, not merely as bankers, but as trustees, having notice of the trusts affecting the funds. They had two accounts, one in respect of the harbour, and the other in respect of the river; and the commissioners could not, without committing a breach of trust, apply to one of those purposes the funds directed to be applied to the other. The case is analogous to that of a person keeping two accounts with his banker, one as executor of A., and the other as executor of B., the banker having notice of the character of the funds and of the trusts affecting them. The accounts are as distinct, as they would be if kept by two distinct sets of commissioners.

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Mr. *Russell*, in reply, was stopped by the Court.

Sir JOHN CROSS.—There was only one account of banker and customer between the bank and the commissioners; and if the bank had been indebted to the commissioners in one sum on account of the harbour, and in another on account of the river, the commissioners might have recovered both in one action. If the commissioners also had brought an action against the bank before the bankruptcy on the river account, the

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bank would have had a right to set off what was due on the harbour account. I am of opinion, therefore, that the assignees have no just cause to bring an action against the commissioners, and that the petitioner is entitled to so much as is due on the balance of the two accounts. It seems the commissioners have not yet attempted to prove; but I do not know whether that fact is material; for if they attempt to prove the whole of the amount due on the harbour account, the assignees will have a right to insist on deducting the debt due to the estate on the river account; I think, therefore, that the petition is in every respect right, and that the action must be stayed; the petitioners having liberty to go in and prove the balance due upon the two accounts.

ORDERED as prayed; the costs of both parties to come out of the estate.

Ex parte WASHINGTON JACKSON and others.—In the matter of WILLIAM SYDNEY WARWICK and WILLIAM CLAGGETT.

Westminster,  
coram Lord  
Cottenham, C.  
June 9 & 11.

SPECIAL CASE (a).

A New York house accepts bills for the accommodation of a Virginia house, on an agreement for reimbursement entered

THE petitioners claimed a debt of 10,410*l.* under a joint fiat issued against the said *William Sidney War-*

(a) See this case on the original hearing in the Court of Review, 3 Mont. & Ayr. 627; *Ex parte Whitmore*, 3 Deac. 365; *Ex parte Jackson*, *id.* 651. into by a London merchant, the correspondent of the Virginia house. Afterwards the London merchant enters into partnership, and by letter desires the New York house to consider all credits, advices and instructions then in force from him, as extending to the new firm, and to transfer any balances due to or from him to the new firm. The New York house reply, that they will make up and transfer to the new firm the open accounts in joint exchange transactions, but that they hope to have the account current made up before they carry the old account to the new firm. They afterwards pay the accommodation bills and draw on the new firm for the amount. The new firm becomes bankrupt. *Held*,

1. That the question, whether the liability of the new firm had been accepted, in lieu of, or in addition to, the separate liability of the London merchant, was a matter of fact, and not a proper subject for a special case.

2. That, under the circumstances, the separate liability was discharged, and that the New York house were only joint creditors.

*wick* and *William Claggett*, as partners in trade, and the proof was admitted as the separate debt of *Warwick*; whereupon the assignees preferred their petition to the Court of Review, alleging that the debt was a joint and not a separate debt, and praying that the said proof might be expunged; and it was ordered accordingly.

The present petitioners some time afterwards preferred their petition to the Court of Review for a rehearing, which was granted to them; and, on the hearing of that petition, the facts were found by the Court as follows:

In the month of June 1836, *Warwick* was a sole trader, carrying on business in London, and he had then various dealings with the petitioners, who were merchants in the United States, and also with certain other merchants there, trading under the name and firm of *A. and J. Warwick*; and on the 29th of June the bankrupt *Warwick* addressed two letters to the petitioners as follows:

London, 29th June 1836.

"I hereby open a credit upon you, in favour of Messrs. *A. and J. Warwick*, for 100,000 dollars, say 100,000 dollars, and their drafts to that extent you will please to honour, and your valuations upon me in reimbursement shall meet with due protection;" meaning that their charges should be duly paid.

And in the other letter, inclosing the above, *Warwick* stated thus, "the object of this credit is for *A. and J. Warwick* to reimburse themselves for advances on tobacco to my address; and, as that article is a heavy one, you may reimburse yourselves upon me at three or four months' sight, or sixty days, as may be most agreeable to yourselves."

On the 15th August, the petitioners sent an answer

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to the bankrupt *Warwick*, acceding to his proposal; and in pursuance thereof, they accepted three bills, drawn upon them by *A. and J. Warwick*, one dated the 25th August, at ninety days' date, for 20,000 dollars; and two others, dated the 1st September, for 15,000 dollars each. After these bills had been so accepted, *Warwick* and *Claggett* entered into partnership; and on the 1st October the bankrupt *Warwick* addressed a letter to the petitioners, announcing the fact, and saying, "I beg you will consider all credits, advices and instructions now in force from me, as extending to the firm of *Warwick* and *Claggett*." And on the 6th October, *Warwick* and *Claggett* wrote a joint letter to the petitioners, stating as follows:—"Mr. *W.* has requested you to consider all credits, advices and instructions in force from him, as extended to us, which we beg to confirm." The two last mentioned letters were received by the petitioners on or before the 15th November, and before any one of those bills had come to maturity, and consequently before the contract was executed on either side. The petitioners by letter acknowledged the receipt of the two last mentioned letters, and made no objection to the joint proposal; and afterwards, in compliance therewith, as the bills respectively became due, they paid them off, and drew five other bills of equal value for their repayment on *Warwick* and *Claggett* jointly, and which five bills the latter jointly accepted; and the only question considered by the Court was, whether, in fact, before the separate liability of *Warwick* was matured into a debt, it was agreed between *Jackson* and Company on the one part, and *Warwick* and *Claggett* on the other, that the executory contract should be transferred to the partnership,—or that it should continue the sepa-

rate contract of *Warwick*, and the partnership to become surety for the performance of it; and the Court thereupon held and determined, that this transaction was included in the joint proposal,—that by drawing the five bills on the partnership, the petitioners expressly acceded to it,—that each of such bills correctly represents the only subsisting contract signed by both the contracting parties,—that the consideration for the debt in question was money paid to the use of *Warwick* and *Claggett*, at their joint request,—and that it never was the separate debt of *Warwick*, nor was considered such by the petitioners till after the bankruptcy; whereupon it was again ordered by the Court that the proof thereof be expunged, and that the petitioners should pay the respondent's costs of the rehearing.

In addition to the facts above mentioned, evidence was adduced for the petitioners on the rehearing, to show how the transaction was dealt with in the books of the bankrupts; and evidence to the same effect was also adduced for the respondents; but the Court considered such evidence as immaterial to the question, whether, as between the petitioners and the bankrupts, the debt was a joint or separate debt, and disregarded it. Nevertheless, at the request of the petitioners, the following affidavits, letters and accounts, which were read on the hearing, and considered by the Court to be true in matter of fact, are inserted in this special case.

The special case then proceeded to set out various accounts and several extracts from letters; those principally relied upon being the following :

*From Jackson, Riddle and Co. to W. S. Warwick,  
dated 31st August 1836 and 6th September 1836.*

“ Your friends, Messrs. *A. and J. Warwick*, of Rich-

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mond, under date of the 24th instant, advise their bill on us, under your letter of credit, for 20,000 dollars, at ninety a. s. days from 26th, for which due honour is reserved. Your general account is debited for an acceptance of *A. and J. Warwick*, two bills dated 1st September, each for 15,000 dollars, at seventy-five and ninety a. s. date at maturity, of which we will take our reimbursement of sales of ex. on you."

*Letter from W. S. Warwick to Jackson, Riddle and Co., dated 1st October 1836.*

"I credit your general account with your acceptances of Messrs. *A. and J. Warwick's* two drafts of 15,000 dollars each, in conformity with your advice. I have much pleasure in waiting upon you with the inclosed circular, announcing to you the connection I have formed from this date with Mr. *J. W. Claggett*. In doing so, I beg that you will consider all credits, advices and instructions now in force from me, as extending to the firm of *Warwick and Claggett*; and I sincerely hope that they will enjoy a long continuance of the friendly correspondence, that has hitherto existed between yourselves and me individually. They will hereafter address you; and, upon the receipt hereof, you will please render your accounts with me, transferring any balance that may be either due to or from me to the new firm."

*Circular in the foregoing letter.*

London, 1st October 1836.

"We beg reference to the annexed letter, announcing the establishment of our firm from this date, and to solicit an extension to us of the same favour and confidence hitherto shown to Mr. *W. S. Warwick*."

*Letter from Warwick and Claggett to Jackson, Riddle and Co., dated 3d November 1836.*

London, November 3d 1836.

“Referring to the annexed duplicate of our respects of the 30th and 31st ult., we have now to acknowledge receipt of your esteemed favour of the 30th September, transmitting statement of joint exchange account to Mr. *W.* to the 1st October. We inclosed Mr. *W.*’s statement of this account, showing a sterling balance due to him in cash 1st October 25,562*l.* 5*s.* 6*d.*, which we have transferred to debit of your new joint ex. ac. with us at par 113,610: 11 dollars, and we carry agreeable to your

request  $\left\{ \begin{array}{r} 113,610 : 11 \\ 9,944 : 46 \\ \hline 123,554 : 57 \end{array} \right\}$  the balance of prem. and interest

to new prem. of joint ex. ac., which, if found correct, you will please note in conformity. We regard all subsequent operations as applying to the new firm, and have passed them accordingly.”

*Letter from Jackson, Riddle and Co. to Warwick and Claggett, dated 15th November 1836.*

“We have to own receipt of the two valued favours of the 29th and 1st ult. and your esteemed favour of 6th ult., as also your circular favour 1st ult., all of which have had our careful attention. We shall be very happy to cultivate the most intimate business relations with your firm, and will gladly avail ourselves of every opportunity that may be presented to influence valuable business to your good management. We shall make up and transfer to your new firm the open accounts in joint exchange transactions, but hope to have your account current made up to ours transmitted, before we carry the old account over to your new firm; but, if not received,

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we will make up our accounts with your prior by next packet."

*From Jackson, Riddle and Co. to Warwick and Claggett,
 dated 19th November 1836.*

" Be pleased to honour our two bills, viz.—

			£	s.	d.
Nov. 19.	No. 97.	60 a. s. for <i>T. W. Spring</i> .	2429	0	0
	No. 98.	„ <i>J. Riddle and Co.</i>	698	16	3
Together amounting to			3127	16	3

sterling, sold at 9% premium, and producing 15,152 $\frac{1}{100}$ dollars cash to day, at credit of your own account against *A. and J. Warwick's* bill of 15,000, due and paid yesterday, as per statement of same inclosed."

*From Jackson, Riddle and Co. to Warwick and Claggett,
 dated 23d November 1836.*

" Exchange continues higher than we anticipated, we therefore defer purchasing for this packet, and for the same reason are drawing against our acceptance of *A. and J. Warwick's* bills for 20,000 dollars, which will mature on the 26th, as per statement at foot."

*From Messrs. Warwick and Claggett to Messrs. Jackson,
 Riddle and Co., dated 14th December 1836.*

" Your esteemed favours of the 19th and 23d ult. are to hand, your valuations, viz. 2429*l.*, 689*l.* 16*s.* 3*d.*, 3176*l.* 12*s.* 10*d.*, 1000*l.* under date 19th ult. and 23d, have appeared and received due honour to the debit of Messrs. *A. and J. Warwick*, the same being in reimbursement of their valuation upon you. Your draft on joint ex. acc. for 1000*l.* has also appeared and received due honour to the draft of the said account."

Letter from Messrs. Jackson, Riddle and Co. to Warwick and Claggett, dated 7th December 1836.

"We also hand joint account with *William Sidney Warwick*, esquire, made up to the 1st December, at Cr. of same Dr. cash, 1st instant, 11,325*l.* 8*s.* at par 50,305- $\frac{4}{10}$ dollars, and also joint prem. account connected therewith, showing a balance of Cr. of same 4047 dollars cash, 1st December, which we hope will prove correct. We await your account made up with interest the same period, to carry the balance to your account."

Jackson, Riddle and Co. to Warwick and Claggett, dated 7th January 1837.

"We have accepted *A. and J. Warwick's* bills against your credit, dated 2d instant, for which at maturity we will draw on you as heretofore."

Mr. *Bethell*, for the appellants. The only ground, on which the judgment of the Court of Review rests, is the fact of the bills being drawn by the petitioners on the new firm of *Warwick and Claggett*. Now, it cannot be inferred from this circumstance, that the petitioners intended to release *Warwick* from his separate liability; for that was the only form in which, after the new firm came into existence, bills could be drawn, so as to have any value in the market. When the bills were drawn, there was no house trading under the name of *Warwick* alone; and, consequently, the acceptance was necessarily to be that of the new firm. But the entries in the petitioners' books show, that they continued to treat the liability as that of *Warwick* alone, and never mixed the transaction up with their general dealings with the partnership. Would it be reasonable to suppose that the new firm

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was at once not only to be involved in the general operations of the concern, but to take upon itself a distinct contract of suretyship, which had nothing to do with the partnership business? Very distinct evidence must be produced, to show, that the new firm intended to make itself primarily liable upon such a contract, or that the petitioners could have considered such to be their intention, and acquiesced in it so far as to release *Warwick* from his separate liability. It is, besides, doubtful, whether, without the concurrence of the principal debtors, new sureties could be substituted for the old ones; and also, whether the new firm could become sureties, without a new and express guarantee signed by them. The sense in which the parties understood the expression, "all credits, advices, and instructions now in force from me," appears from the letters of the 3rd and 15th of November, which clearly show that the proposal was not accepted or considered as extending to the contract for suretyship. An agreement to abandon the former security must be clearly proved; *Bedford v. Deakin*(a), *Winter v. Innes*(b). It does not follow, from the fact of *Warwick* and *Claggett* desiring to have the credit transferred, that the petitioners are to lose the benefit of the separate security of *Warwick*; it must be shown that the petitioners agreed to take the joint liability, in discharge of, and as a substitution for, the separate liability. [*Lord Chancellor*. The expression is, not that the joint liability is to be accepted in addition to the separate liability, but that the balance should be transferred.] What is said by the judges in *David v. Ellice*(c), shows in how strict a manner Courts of law require it to be proved, that a

(a) 2 B. & Ald. 210. (b) 4 My. & Cr. 101. (c) 5 B. & C. 196.

new security is taken as a substitution for a former one. Now, in the present case there is an account sent to *Warwick* and *Claggett*, not containing any entry in respect of the guarantee; and there is a letter from *Warwick* and *Claggett*, acknowledging the receipt of the account, but not complaining of it at all on the ground of this omission, although complaining of it in other respects. Under these circumstances, a Court of law would not hold this correspondence to be sufficient evidence of a contract to release the original liability.

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Mr. *Swanston*, and Mr. *Lee*, for the respondents, contended that the case was improperly brought before the Court, the question being one of fact, merely. [*Lord Chancellor*. I certainly cannot see what question of law there is in this case.]

Mr. *Bethell*, in reply. What is called a question of fact is this: What is the inference to be drawn from certain written documents? But is not that inference matter of law? Is it not a question of construction; and are not such questions constantly the subject of decision by Courts of law? The respondents say, that *Warwick* was released. How he was released is the question now in dispute; but what amounts to a release must surely be a question of law. It is a matter of law, to say, whether a particular document amounts to a release, or not. Suppose the correspondence which has taken place here related to the purchase of an estate; would it not be a matter of law, to decide whether the letters amounted to a binding contract? or would the Court of Chancery send such a question to be tried by a jury? And, at all events, the question, whether one

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and others.

surety can be substituted for another, without the consent of the principal, is one of law only ; and it is one of the questions involved in this case.

LORD CHANCELLOR.—The question in this case is not, whether the circumstance of the petitioners' accepting the liability of the new firm was of itself sufficient to discharge the original liability of *Warwick*, but whether it was the intention of the parties so to contract. That is purely a matter of fact. The evidence of it may rest, in part, upon the correspondence between the parties ; but no question of construction arises on any document ; and all that is to be decided is, whether the new credit was accepted in lieu of the former credit. A judge in a trial at law would have told the jury, that this was matter for their consideration. I think, therefore, that this is a case, which ought never to have been brought here, it being clearly one upon which by the terms of the statute there could be no appeal. However, lest it should be conceived, that if this Court had been at liberty to entertain the question, it would have arrived at a different conclusion from that to which the Court of Review has come, I will shortly advert to the circumstances of the case. A house in London writes to the petitioners, recommending to them another house carrying on business in America, and proposing that the American firm shall draw on the petitioners. The terms of the contract are these, " I hereby open a credit upon you in favour of Messrs. *A. and J. Warwick* for 100,000 dollars, and their drafts to that extent you will please to honour, and your valuations upon me in reimbursement shall meet with due protection." The petitioners in compliance with this request, accepted three bills, drawn by *A. and J. Warwick*,

and apprised the bankrupt *Warwick* of the fact. Then, on the first of October, the petitioners receive a letter, which after announcing the formation of the partnership of *Warwick* and *Claggett*, and requesting the petitioners to consider all credits, advices and instructions, then in force from *W. S. Warwick*, as extending to the firm of *Warwick* and *Claggett*, contained this passage, "upon the receipt hereof, you will please render your accounts with me, transferring any balances that may be either due to or from me to the new firm." The petitioners, in answer to this proposal, send the letter of the 15th of November, which is as follows; [his Lordship read it] (a).

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By this letter, therefore, the petitioners do not object to the proposition, but assent to it, requesting only the accounts to be made up first. But the most important part of the transaction is, the circumstance of the petitioners having drawn on the new firm, after the correspondence had taken place. This act must, I think, be considered an acceptance of the proposition, that the petitioners should look to the new firm exclusively. The question before the Court of Review was, whether the petitioners had not accepted a credit on the new house, in lieu of that upon the old house. That was a matter of fact, which, it appears to me, has been conclusively decided by the Court of Review; but, for the satisfaction of the parties, I wished to show them that no other decision would have been given, if I had thought otherwise with respect to the question of jurisdiction.

Appeal dismissed with costs.

(a) See *ante*, p. 151.



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Westminster,
June 10.

Ex parte HENRY BILLINGTON WHITWORTH and ROBERT WHITWORTH.—In the matter of EDWARD LEWIS MAYOR.

1. The rule, that, where a man agrees to pay on demand a debt, not his own, demand is necessary to create a right of action against him, does not apply to the case of a joint and several promissory note, in which one of the makers is known to join only as a surety for the other.

2. Where the Commissioners have not admitted a proof tendered to them, the Court may direct it to be placed on the proceedings at once, without referring it back to the Commissioners; although the proof may not have been rejected, but only adjourned.

THIS was a petition, praying, that the petitioners might be admitted to prove certain sums therein mentioned to be due to them, as copartners in trade, upon two joint and several promissory notes made by the bankrupt and one *George Cooke*, and that the Commissioners might be ordered to receive such proofs, and to appoint a meeting for that purpose, and that in the mean time the allowance of the bankrupt's certificate might be stayed.

The petition stated, that the former of these promissory notes was one for 1500*l.*, and was given by *Cooke* to the petitioners, who were his bankers, to secure the repayment of an advance of that amount, made to him by them. The following was the form of the note.

"Northampton, July 11th 1838.

"On demand, we jointly and severally promise to pay to Messrs. *Charles Whitworth* and Sons, or their order, 1500*l.* for value received, with lawful interest.

George Cooke. Edward L. Mayor."

The other promissory note, which was in similar terms, was stated in the petition to have been given to secure a sum of 340*l.* advanced by the petitioners to *Cooke*. The fiat issued on the 3rd of February 1841, and on the same day a fiat was issued against *Cooke*.

On the 17th of March 1841, the petitioners filed a bill in Chancery against the assignee of *Cooke*, the assignee of *Mayor*, and one *George Pell*, praying that the petitioners might be declared to have a good equitable lien on certain property of *Cooke*, of which they claimed to be equitable mortgagees, in priority to certain elegits,

therein mentioned to have been sued out against *Cooke* by *Mayor* and *Pell*, and that the security might be realized, and the proceeds applied in or towards payment of what was due to the petitioners upon it, and if the proceeds were insufficient to pay the sums due to the petitioners, then that they might be at liberty to prove for the deficiency under the fiat against *Cooke*; and for a receiver and injunction, with the usual directions. On the 22nd of March 1841, an injunction was granted in the suit, restraining the defendants from receiving the rents, or taking any other proceedings under their elegits.

The second public meeting under the fiat against *Mayor* took place on the 19th of March, for the last examination of the bankrupt; when the petitioners tendered a proof for 1973*l.* 14*s.* 9*d.*, being the amount of the notes for 1500*l.*, and 340*l.* with the interest up to the date of the fiat. It was then stated to the Commissioners, on behalf of the assignee of *Mayor*, that a suit in Chancery had been commenced by the petitioners against *Mayor's* assignee and other parties; and the result was, that the proof was not admitted. The evidence in support of the petition, and that produced by the respondents, were contradictory as to the circumstances under which the Commissioners declined to receive the proof; the former evidence being to the effect, that the proof was rejected on the ground of the pendency of the suit; and the latter stating the proof to have been merely adjourned, until an opportunity should have been given of seeing a copy of the bill in Chancery, or learning its scope and effect. On referring to the proceedings, it appeared that the deposition in support of the proof had been sworn and filed with the proceedings, but was not signed by the Commissioners; who had not made any

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memorandum of adjournment, or to any other effect with regard to the proof. The present petition stated, that the petitioners' debt would turn the certificate. On behalf of the respondents, it was sworn that the petitioners made no application to prove at the first public meeting, and that a meeting was held on the 17th of April, having been advertized in the London Gazette on the 6th, for the proof of debts under the fiat; but that the petitioners had not attended such meeting.

There was also an affidavit to the effect that no demand had been made on the bankrupt, before the bankruptcy, for payment of the sums payable upon the notes.

Mr. *Swanston*, for the petition.

Mr. *Anderdon*, and Mr. *F. J. Hall*, for the assignees. There was no rejection of the proof, it was merely adjourned to enable the assignees to inquire into the nature of the suit in Chancery, which the petitioners had instituted only two days before they tendered their proof. [Sir *J. Cross*. As the bankrupt was no party to the suit, how could it affect the right of proof?] The bill was a complicated one, and it related to the subject of the proof; and it was perfectly open to the petitioners, after the assignees had satisfied themselves with respect to the suit, to tender the proof again. The present application is improper, as no decision has yet been given by the Commissioners as to the validity of the debt (a).

Mr. *J. Russell*, and Mr. *Bacon*, for the bankrupt. There has been no investigation of this claim before the Com-

(a) See *Ex parte Marson*, 3 M. & A. 156; 2 Dea. 245.

missioners, the proof having been adjourned, and until a fair opportunity has been given to contest the proof before the Commissioners, the Court cannot order the proof to be placed on the proceedings; all this Court could do would be to give the petitioners liberty to go in and make such proof as they might be able to establish (a). One obvious objection to the proof would be, that no demand had been made for payment from the bankrupt before the bankruptcy. In *Rowe v. Young* (b), *Bayley, J.* lays down the rule to be, that "where a man engages to pay upon demand what is to be considered his own debt, he is liable to be sued upon that engagement, without any previous demand, and that a tender or readiness to pay must come by way of defence; but that if he engage to pay on demand what was not his debt,—what he is under no obligation to pay,—what, but for such engagement, he would never be liable to pay to any one,—a demand is essential, and part of the plaintiff's title." [Sir *J. Cross*. That was not the case of a joint and several negotiable instrument; upon such an instrument the party to whom it is given may sue either party.] That rule would undoubtedly apply, if both parties were principal debtors; but here the bankrupt was, and was known to the petitioners to be, merely a surety for the other party.

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Mr. *Swanston*, in reply. No demand for payment was necessary. *Rowe v. Young* (b) is quite different from the present case, and was a case of a special acceptance.

(a) *Ex parte Marson*, 3 M. & A. 156; 2 Dea. 245; but see also *Ex parte Skipp*, Mont. & Bli. 262; 2 D. & C. 88.

(b) 2 Bli. 465.

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The rule is, that a promissory note payable on demand is proveable, without demand; and no distinction has ever been made between the cases where one of the makers is a surety, and those where all are principals.

Sir JOHN CROSS.—This is the petition of a creditor, who seeks to establish a proof of a debt of 1900*l.*, which he says was wrongfully rejected by the Commissioners; and he complains that they have granted the bankrupt's certificate, without taking his debt into calculation. Upon this petition three questions have been raised, first, whether the petitioner has a proveable debt; secondly, whether the proof was rejected by the Commissioners; and thirdly, whether the petition was served too late to stay the certificate. With regard to the first of these questions, I think there is no doubt that the petitioner has a proveable debt. He held two joint and several promissory notes of the bankrupt, and another person; one for 1500*l.* and interest, and the other for 350*l.* and interest, and to his proof upon these notes no sufficient objection was made. I am therefore of opinion, that the petitioners have, or had when they appeared before the Commissioners, a proveable debt. The notes were produced before the Commissioners at a public meeting, the creditor deposing to the debt, and doing all that is required of him by law for the purpose of having his proof placed upon the file of the proceedings. This brings me to the second question, which is, whether the proof was rejected; now there has been a great deal of discussion as to whether the proof was rejected or only postponed, and a great part of the evidence contained in the affidavits applies chiefly to this fact, which ap-

pears to me not greatly, if at all, material to the present question. The creditor appeared before the Commissioners, produced the promissory notes, and deposed to the existence of the debt; and I cannot discover that any objection was made to the proof, except that the 59th section of the Bankrupt Act prevented it from being made. Something indistinct seems to have been said respecting a bill in Chancery, and accounts being taken; but the Commissioners, nevertheless, had the deposition of the creditor reduced to writing in the usual form, and signed by the petitioner, and there is nothing defective in the deposition, as it stands on the file of the proceedings. The Commissioners, however, have left the matter in great uncertainty; for they do not, as is usual, put their names to the deposition, or make any memorandum to the effect that the proof was adjourned. Under these circumstances, it is stated on behalf of the petitioners, that the proof was rejected; while, on the other side, it is alleged to have been only adjourned. This, however, is certain, that the proof was not admitted; and the question therefore is, whether it ought not to have been admitted. I am of opinion, that the Commissioners, having taken the deposition, seen the notes, heard the objections to the proof, and got the signature of the petitioner, ought to have admitted it, and that the deposition ought to stand as a proof. The Court therefore feels bound to declare, that the debt of the petitioners was duly proved on the 19th of March last by the deposition of the petitioner, *H. B. Whitworth*, then taken before the Commissioners, and standing on the file of the proceedings, and ought then to have been admitted by the Commissioners as a valid and sufficient proof; and the Order will be, that this deposition shall

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stand and be deemed as such proof, to all intents and purposes whatsoever, and that the certificate be sent back to the Commissioners to be reviewed with due regard to such proof.

ORDERED accordingly; costs of all parties to be paid out of the estate.

Serjeants' Inn  
Hall,  
August 9 & 10.

Ex parte HENRY BILLINGTON WHITWORTH and ROBERT WHITWORTH.—In the matter of EDWARD MAYOR.

1. In a petition to be admitted to prove and to have the certificate stayed, on the ground of the Commissioners having improperly declined to admit the proof, it is not necessary to allege that the petitioner's debt will turn the certificate.

2. The Commissioners have no jurisdiction to expunge a proof which has been placed on the proceedings, in pursuance of an Order of the Court of Review.

3. The Commissioners can only expunge a proof, on the ground that the debt is not due; and it is irregular for them to state, as a ground for expunging, that the bankrupt's liability has been discharged.

4. Bankers make an advance to a customer, on the security of a joint promissory note of himself and a surety. The customer afterwards pays into the bank, generally, sums exceeding the amount of the advance, but also draws out a still larger amount, and becomes bankrupt. Held, that the surety is not entitled to have the payments appropriated in discharge of the sum secured by the note.

AFTER the Order had been drawn up on the petition in the last case, the assignee applied to the Commissioners to expunge the proof, on the ground, among others, that the debt of *Cooke*, to secure which the joint promissory notes had been given, had been written off in his banking account with the petitioners, and that there was consequently nothing due on the note. For proof of this fact, the assignee relied on entries in the petitioners' pass books, showing that, after the promissory notes had been given, *Cooke* had paid into the bank sums to an amount exceeding that secured by the notes. *Cooke*, also, on being examined on behalf of the assignee, deposed that these sums had been paid in by him generally, and that the petitioners might, if they had thought proper, have stopped the amount secured by the notes out of such subsequent payments. On the other hand, the

petitioners relied on other entries, as showing that those subsequent payments had been exceeded by the amount afterwards drawn out by *Cooke*, and that he had acknowledged the sums secured by the notes, as a subsisting debt, by permitting himself to be regularly debited with interest on those sums. The Commissioners, however, considering the debt to be discharged by the payments, expunged the proof, and again advertized the certificate for allowance (a). The present petition was then presented to have the proof restored, and the certificate stayed.

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Mr. *Swanston*, and Mr. *Keene*, for the petition. The proceeding of the Commissioners in expunging a proof, which had been allowed by the Order of this Court, was altogether irregular. If new facts were discovered, the proper course was to apply to this Court for a rehearing,

(a) The following was the substance of the memorandum of the Commissioners, on expunging the proof: "We, three of the Commissioners, &c. having been personally attended, &c. and having examined upon oath the said *H. B. Whitworth* and the said *G. Cooke*, both in reference to the pass book or banking account of the said *G. Cooke* with the said Messrs. *Whitworth*, and also in reference to the general dealings and transactions of the said Messrs. *Whitworth* and *Cooke*, and the various payments made by the said *G. Cooke* to the said Messrs. *Whitworth* subsequent to the dates of the said notes; and taking into consideration the subsequent acceptance by Messrs. *Whitworth* of a deposit of deeds by Mr. *Cooke* as a security for the payment of such notes, and the evidence of the said *H. B. Whitworth* and *G. Cooke*, and the arguments adduced on behalf of the assignee, *J. Mayor*, and of Messrs. *Whitworth*, and upon the authority and principle of the cases of *Clayton v. Noble*, 1 Mer. 572; *Bodenham v. Purchas*, 2 B. & A. 39, and *Pemberton v. Oakes*, 4 Russ. 154, we are of opinion that the bankrupt was, at and before the date of the fiat, discharged from his liability in respect of the said notes, and that the debt so proved under the said fiat, by the said *H. B. Whitworth*, ought to be expunged. We therefore have, by virtue of the statute in that case made and provided, expunged the said debt of 1973*l.* 14*s.* 9*d.* from the proceedings under the said fiat."

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and not to bring the matter before the Commissioners, who have no jurisdiction to interfere with a proof which has been the subject of adjudication here. The case, however, is equally clear upon the merits. The note was intended as a continuing security, and the debt was throughout treated as a subsisting one, as is evident from the circumstance of interest being charged and paid upon it. It would be impossible to apply to such a case rules, which may have been adopted for the appropriation of payments, in the absence of any evidence of intention. They cited *Harrison v. Courtauld* (a).

Mr. *Anderdon*, and Mr. *F. J. Hall*, for the assignees. The objection to the jurisdiction of the Commissioners is unfounded; for when the proof is once admitted upon the proceedings, the means by which it is placed there are immaterial; it is subject to be dealt with in the same way as any other proof, and is consequently capable of being expunged by the Commissioners, under the 6 *Geo. 4. c. 16. s. 60*. No authority has been produced for the distinction which has been attempted to be drawn between proofs admitted by Orders of this Court, and those which are placed on the proceedings without any such Order; and the distinction cannot be supported on any sound principle. With regard to the merits of the case; it is not alleged that any agreement or communication took place between the parties, to the effect that the note was to be regarded as a running security. On the contrary, it was given as a security for a specific advance; and the party, who was known to the petitioners to have joined in it as a surety only, is entitled to say that the note was satisfied by the first monies paid

(a) 3 Barn. & Ad. 36.

into the bank by the principal debtor; *Pemberton v. Oakes* (a), *Brooke v. Enderby* (b), *Simpson v. Cook* (c), *Wright v. Lainy* (d), *Devaynes v. Noble*, *Clayton's case* (e), *Smith v. Beckett* (f), *Laxton v. Peat* (g), With regard to the charge of interest in the accounts; in the first place, the item relied upon is not stated in the accounts to be a charge in respect of interest; and in the next place, an *ex post facto* act of this kind, of the creditor and principal debtor, cannot affect the rights of the surety.

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Mr. J. Russell, and Mr. Bacon, for the bankrupt. The petition must be dismissed, so far as regards staying the certificate, for it contains no allegation that the debt will turn the certificate; *Ex parte Skipp* (h). It is true that the former petition, which is set out in this, did contain such an allegation; but the Court could not now act on that allegation; and as new debts have been proved since, it would not follow that, even if the allegation were true then, it would be true in the present state of affairs.

Sir JOHN CROSS.—I will not trouble the counsel for the petitioners to argue the point, as to the want of an allegation in the petition that the debt in question would turn the certificate; for how can a creditor, who has not been admitted to prove, have any knowledge respecting the certificate, or the creditors who have signed it?

August 10.

(a) 4 Russ. 154. (b) 2 Brod. & Bing. 70. (c) 1 Bing. 452.  
(d) 3 Barn. & C. 165. (e) 1 Mer. 585. (f) 13 East, 187.  
(g) 2 Camp. 85; *sed vide Fenton v. Pocock*, 5 Taunt. 192; 1 Marsh. 14.  
(h) Mont. & Bli. 262, and 2 D. & C. 88.



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Mr. *Swanston* was then heard in reply.

Sir JOHN CROSS.—I believe I should best have discharged my duty, by not suffering the objection to the former Order of the Court to be discussed; and I ought, perhaps, to have sent the case back at once to the Commissioners, directing them to restore the proof. If the assignee only had been concerned, I should have taken that course; for the regular mode of proceeding for the assignee to have adopted, if he had discovered any new fact, entitling him to consider the debt as paid, was not to call on the Commissioners to reverse the Order of this Court, but to come here again, to have the case reheard upon the new matter. But, as this involved also the interest of the bankrupt, whose certificate would be delayed, if not defeated, by the case being at once sent back, with an Order restoring the proof, I wished, in mercy to him, to see whether there were any circumstances which would entitle him to get rid of this debt; and it was with that view alone that I permitted the argument to proceed. The way in which I view the facts is this: the bankrupt, *Cooke*, applied to the bankers to lend him 1500*l.*, and, as an inducement to them to do so, gave them a joint promissory note of himself and the present bankrupt *Mayor*. The bankers discounted this note, and did, in effect, though not in form, the same thing as if they had counted down to *Cooke* 1500*l.* in cash, and taken the note as security. It was, in fact, done with the pen, but the effect was just the same; and the transaction amounted substantially to discounting a joint note of two contracting parties. Now it appears to me, that the contract of the petitioners with the two bankrupts, as to the promissory note, is quite distinct

from the banking account, and that it is altogether immaterial what became of the money. *Mayor* was no party to the banking account; he was only a party to the note, on which the money was advanced. Here, then, are the bankers in possession of this joint and several note, on the credit of which they have lent 1500*l*. The security has never been recalled, nor has the debt ever been paid, as it appears to me, even as between them and *Cooke*. I rest, however, on this, that *Mayor* was a stranger to the accounts, and had no right to say the debt was paid by the mode in which those accounts were kept. In all the cases referred to, the party insisting that the debt was discharged, was a party to the accounts; as, for instance, in the case of an account between the estate of a deceased partner and the continuing firm. It appears to me, therefore, that the joint debt was never paid, and that *Mayor* was not discharged from his liability on the note. It was, moreover, altogether irregular for the Commissioners,—instead of finding that the debt was not due, the only case in which they are authorized by the act of parliament to expunge a proof,—to find that the bankrupt was discharged from his liability. That was not the correct mode of expunging the proof, even if it had been a proof which the Commissioners had a right to expunge. Under these circumstances, therefore, I am of opinion, in the first place, that the Commissioners have acted irregularly, in reversing, in effect, a judgment of this Court; and, secondly, that they have judged erroneously, in considering the debt as one in respect of which the bankrupt's liability was discharged. With regard to the allowance of the bankrupt's certificate, the Court cannot enter into considerations of generosity or indulgence; it can only ad-

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minister justice between the parties, according to their legal right; and as I am of opinion that this proof must be restored, the necessary consequences, with regard to the certificate, must follow. The Order will be for the proof to be restored, and for the certificate to be sent back to the Commissioners to be reviewed; the costs of all parties being paid out of the estate. The only question which appeared doubtful to me was, whether I ought not to make the assignee pay the costs personally.

*Westminster,*  
*June 11,*  
*coram Lord*  
*Cottenham, C.*

Teas are sold to be paid for at appointed days, the sales being made according to the custom of the trade, whereby the goods, when sold, are left as a pledge for full payment with the vendor, who, in case of non-payment, is at liberty to resell and charge the loss to the original purchaser. The purchase money is not paid at the appointed time; the purchaser becomes bankrupt; and the vendor, having sold part of the teas before the fiat, and the rest afterwards, gives the estate credit for the clear proceeds of the sales, tendering a proof for the residue of the original purchase-money. *Held*, that although there was no delivery of the goods, the original sale was a binding contract within the Statute of Frauds, and that the claim of the vendors constituted, not unliquidated damages, but a proveable debt.

*Ex parte* GEORGE MOFFATT and another.—In the matter of CALEB ASHWORTH TATE.

THIS was an appeal by the assignees of the bankrupt from a decision of the Court of Review (a) on the following SPECIAL CASE.

The petition stated, among other undisputed matters, that the fiat was issued on the 15th May last, and that the petitioners, at a meeting of the Commissioners held for the proof of debts, tendered a proof of a debt of 950*l.* 17*s.* 2*d.* for goods sold by them to the bankrupt, and that the proof was rejected by the Commissioners; and the petition prayed that the petitioners might be at liberty to go in under the fiat and prove their said debt, and that the Commissioners might be ordered to admit the same.

The petition came on to be heard on the 23rd July last, when the Court, having fully heard and considered

(a) See the former report of the case, 1 Mont. Deac. & D. 282.

*Held*, that although there was no delivery of the goods, the original sale was a binding contract within the Statute of Frauds, and that the claim of the vendors constituted, not unliquidated damages, but a proveable debt.

the proofs and allegations of the parties, found the facts of the case to be in substance as follows.

That on the 15th January 1840, and on divers other days and times following, the petitioners bargained and sold to the bankrupt divers quantities of tea, each purchase to be paid for by an immediate deposit in part payment, and the residue on certain appointed days, agreed on at the time of each respective sale; and these several sales were made according to the usual and accustomed course of dealing in the tea trade, whereby the tea, when so sold, is left in the custody of the seller, in pledge for the full payment; and if such payments be not completed within the time appointed at the sale, the seller is at liberty to resell the same, and charge the loss, if any, to the former purchaser, with lawful interest to the time of actual payment, and also with other incidental charges.

That the bankrupt did not complete any of such payments; and after they had respectively become due, the petitioners resold the tea, and charged the loss and expenses occasioned thereby, together with the incidental expenses to the bankrupt. But, at the date and suing forth of the fiat, there were 148 chests of tea so purchased by the bankrupt which were not then resold. That the petitioners gave notice thereof to the assignees, and that the tea would be resold, if not paid for on or before the day agreed upon with the bankrupt, and that the petitioners would charge all losses and expenses thereon against the estate of the bankrupt. The assignees declined to interfere; and when the time was expired, the 148 chests were in like manner resold by the petitioners at a loss.

That the petitioners have charged the bankrupt with all the prices he agreed to pay for the tea so sold to him,

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as one entire debt, and have given credit for the clear produce of the resales so made, as well after as before his bankruptcy, whereby the entire debt is reduced to the sum of 950*l.* 17*s.* 2*d.*; which is the debt in question, the proof whereof was rejected by the Commissioners.

Under these circumstances, it was contended on the part of the assignees, that the contracts between the petitioners and bankrupt were rescinded by the resales, and that the claim of the petitioners was for unliquidated damages, which did not constitute a proveable debt.

Nevertheless the Court declared and adjudged, that the contracts were not any of them rescinded, but that they all remained in force as well after, as before, the bankruptcy, regard being had to the course of dealing as aforesaid; and that the debt in question, although equivalent to a loss sustained by breach of contract, was in fact the residue of the original debt contracted before the bankruptcy, after deducting the clear produce of the goods held in pledge by the petitioners, with a power of resale comprised in the original contract, and exercised in part performance thereof. And therefore the Court did order and decree that the petitioners should be at liberty to go in under the fiat, and prove for the said sum of 950*l.* 17*s.* 2*d.*, or such other sum as might be due to them in respect of such sales, and that the Commissioners should receive and admit the same accordingly.

The counsel for the assignees have submitted that the said judgement and decree is erroneous in matter of law, and have applied for this special case; and they have also requested that a copy of the petition may be hereunto annexed, which is as follows.

The special case then set forth the petition to the effect stated in the report of the hearing before the Court of Review, ante, vol. 1, p. 282.

Mr. *Swanston*, Mr. *Spence*, and Mr. *F. J. Hall* for the appellants. First, the special case does not show any valid contract according to the Statute of Frauds, there being no statement of a written contract, part payment, or acceptance of any part of the goods. In the next place, no specific goods are described as having been sold; *Austen v. Craven* (a). But the most important objection to the respondent's case is, that they claim to prove for unliquidated damages. According to the statement in the special case, the seller was at liberty to resell the teas, and charge the loss with interest and incidental charges to the former purchaser; and the question is whether this constitutes a proveable debt. Now the loss was an unascertained amount. [*Lord Chancellor*. The debt is the price for which the tea was first sold, subject to be reduced by the amount produced by the resale.] It will be conceded, that, but for the custom stated in the case, there would be no proveable debt; *Boorman v. Nash* (b); *Green v. Bicknell* (c). In these cases it was held, that what loss was suffered, was a matter to be ascertained by a jury. So in this case the amount of the deductions, and the questions whether the sales were properly conducted, and whether the charges made were proper, are matters which cannot be ascertained without the intervention of a jury. The custom can make no difference in this respect, for it only gives the vendor the benefit of a pledge or security for the amount of the damage incurred by the non-performance of the contract; and the circumstance, that there is a security for a demand, cannot alter its nature, or render it a liquidated claim, if it would otherwise be unliquidated.

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(a) 4 Taunt. 644.

(b) 9 B. &amp; C. 145.

(c) 8 Ad. &amp; E. 701.

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In *Maclean v. Dunn*(a), it was held that a vendor has in general the same right of reselling, as is stated to belong here to the petitioners by the special custom; and yet it has never been held, that in general a vendor who has resold has a proveable debt.

Mr. *Bethell*, Mr. *Anderdon*, and Mr. *Heathfield*, for the respondents. The special case states the custom to be for a deposit to be paid by way of part payment, and for the residue to be paid on certain appointed days, the teas being left in the custody of the seller, by way of pledge for the full payment. The sum due, therefore, is completely ascertained, being the amount of the purchase money at which the teas were sold; and, by leaving them in pledge, a new contract is entered into, carrying with it a confirmation of the contract of purchase. The principle for which we contend is adopted in the familiar case of a sale of real estate(b), where the lien arises, without any special custom or contract for security. Can the nature of the property make any difference, as to the purchase money being a liquidated debt? The same arguments as have been used here with regard to the propriety of the sale, the charges and deductions, would apply in the case of real estates. In *Nash v. Boorman*(c), the bankruptcy occurred before the time arrived for carrying the contract into effect. In *Green v. Bicknell*(d), the ground of the decision was, that every one of the data on which the calculation proceeded might be disputed before a jury. Here every thing is ascertained by the terms of the special case.

(a) 4 Bing. 722.

(b) See *Bowles v. Rogers*, 1 Cooke, B. L. 146 (8th edit.)

(c) 9 B. & C. 145.

(d) 8 Ad. & E. 701.

Mr. *Swanston*, in reply. The Court below has not, by the terms of its Order, liquidated this demand; the Order being, only, that the petitioners should be at liberty to go in under the fiat, and prove the sum of 950*l.* 17*s.* 2*d.*, or such other sum as might be due to them. [*Lord Chancellor.* It is found, as a fact, that the respondents have given credit for the clear produce of the sales.] Still, part of the goods having been sold after the bankruptcy, this statement would not prove that there was a proveable debt at the date of the fiat. The goods must have been delivered, to create a proveable debt. While they remain with the vendor, there is no debt; he may recover damages for breach of contract, but, before verdict, they are unliquidated. The argument founded on the statute of frauds has not been attempted to be answered. That statute provides, that no contract for the sale of goods for the price of 10*l.*, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods, and actually receive the same,—or shall give something in earnest to bind the bargain, or in part of payment,—or unless some memorandum or note in writing shall be signed by the parties to be charged, or their agents. [*Lord Chancellor.* It is stated here, that the dealing took place, according to a custom which created a new and distinct contract by way of pledge, thereby taking the transaction out of the provision of the statute.] The transaction was single; it is not even alleged that there were two contracts; and, therefore, we submit that it must be considered as falling within the provisions of the statute.

LORD CHANCELLOR.—I can only deal with the facts, as set out in the special case. The Court of Review

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states, that on the 15th of January 1840, and on other days, the petitioners bargained and sold to the bankrupt divers quantities of tea; and that these sales were made according to the custom of the tea trade, whereby the tea when sold is left in the custody of the seller in pledge for the full payment. This amounts to the same thing as saying, that the parties had agreed to that mode of dealing. I do not find any statement of part payment having been made; but there is one, which imports an acceptance of the goods by the bankrupt; the transaction being stated to have taken place according to a mode of dealing, by which the goods were left in the possession of the vendor as a pledge. Now, it is not necessary that there should be an actual transportation of the goods, to constitute an acceptance; and the fact of the goods being left, as stated in the case, amounts not only to an acceptance, but to a new contract by way of pledge. The transaction being, therefore, according to the terms of the special case, a purchase, and the bankrupt becoming the owner of the teas, and the vendor the owner of the money, there was no difficulty in ascertaining the debt, and all that remained to be ascertained was what usually remains to be ascertained where there is a pledge, namely, the amount of the reduction to be made in respect of the security. Now the case states, that the teas have been sold, and that the petitioners have given the bankrupt credit for the clear produce of the sales, whereby the entire debt is reduced to 950*l.* 17*s.* 2*d.* There is, therefore, upon this special case no ambiguity as to the amount claimed; there being an original clear debt, with an ascertained reduction to be made on account of the proceeds of the security. The case of *Green v. Bicknell* (a), which has been relied upon, was decided on quite differ-

(a) 8 Ad. & E. 701.

ent grounds; a breach of contract having been there held to have taken place; and it having been considered, that although at the time of the bankruptcy the plaintiffs' claim was measured by the difference between the price agreed to be paid, and the market price when the contract should have been fulfilled, yet the data on which the calculation must have proceeded were not so settled as not to admit of dispute; and that, consequently, the damage sustained could only be ascertained by the intervention of a jury. I think, therefore, that *Green v. Bicknell* is distinguishable from the present case, and that the Order of the Court of Review must be affirmed.

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ORDERED accordingly.

THOMAS HUDSON and others, assignees of JOSEPH FORSTER, JOHN FORSTER, and WILLIAM FORSTER, appellants; ELEANOR FORSTER, respondent.

Westminster,  
coram Lord  
Cottenham, C.  
June 11.

THIS was an appeal from the decision of the Court of Review (a), on the following


SPECIAL CASE.

The special case set forth at length the petition to the Court below, which stated that the petitioner's late father, *John Forster*, carried on, at the time of his death, the trade of a merchant or cotton manufacturer, at his house in Fisher Street in the city of Carlisle, in partnership with

(a) See 1 Mont. Deac. & D. 418.

A testator, by his will, gives 2000*l.* to a daughter, to be paid as thereafter mentioned, and charges certain estates with the payment. In a subsequent passage, he directs the daughter to let her legacy remain in the hands of the executors, at interest, till she should happen to marry, and

that then and in such case the legacy should be paid by certain instalments by the executors, they contributing to the payment equally. He then devises the property charged, subject to the payment of the legacy, to three of his sons, whom he appoints his residuary legatees and executors, they paying his debts, funeral expenses, the legacy above-mentioned, and certain annuities. *Held*, that the bequest was a vested legacy of 2000*l.*, and not merely a gift of the interest while the daughter remained single, with a contingent gift of the principal in the event of marriage.

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 appellants;  
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 respondent.

his sons *Thomas, James, and John*; and by his will (a), after directing his debts and funeral expenses to be paid out of his personal estate, gave and bequeathed to his daughter *Ann* the sum of 2000*l.*, and unto the petitioner, his daughter *Eleanor*, the sum of 2000*l.*; for securing which said two legacies and the interest thereof, till the same should be paid by his executors, which the testator thereby ordered and directed to be paid as thereafter mentioned, he, by his said will, charged and made chargeable, his houses, shops, warehouses and premises, which he then occupied at the lower end of Fisher Street aforesaid, as also his closes at Murrell Hill, with the same, and declared it to be his will and mind, and thereby ordered and directed, that his said two daughters should let their said several legacies remain, continue and be in the hands of his executors, at the interest of 4*l.* per cent. per annum, till they, his daughters, should happen to marry; and that then and in such case, and upon such marriages taking place, the legacy or legacies to be paid upon such her or their marriage or marriages to her or them by instalments, at the rate of 666*l.* 13*s.* 4*d.* by the year, by his executors, and they, his executors, contributing to the payment of such legacies equally, and share and share alike. And the testator also gave and bequeathed unto his son *Joseph*, long since deceased, an annuity of 30*l.* for his life, to be paid in the manner therein mentioned, by his executors, their heirs, executors, or administrators, who were to contribute in paying the said annuity equally, and share and share alike; and the testator thereby charged and made charge-

(a) See 1 Mont. Deac. & D. 418. The will is here set out more fully, as some passages were relied upon before the Lord Chancellor, which were not made the subject of comment in the Court below.

able therewith his said houses, shops, warehouses, and premises, which he, the said testator, occupied at the lower end of Fisher Street aforesaid. And, after making the several gifts and bequests aforesaid, the testator then gave and devised unto his two sons, *James* and *John*, their heirs and assigns, all and singular his said houses, shops, warehouses, and premises, with their appurtenances, situate in Carlisle, which he, the testator, then occupied; to hold the same, with their appurtenances, unto his said two sons, their heirs and assigns for ever, as tenants in common, and not as joint tenants, subject nevertheless, and charged and chargeable, for securing the legacies and the annuity aforesaid. And he also gave and devised unto his son *Thomas*, his heirs and assigns, all and singular those his the testator's several freehold closes at Murrell Hill aforesaid; to hold the same with the appurtenances, unto his son *Thomas*, his heirs and assigns for ever, subject nevertheless, and charged and chargeable, for securing the two legacies before mentioned. And the testator, in and by his will, gave and bequeathed all his stock in trade, looms and other utensils of trade, book debts, and partnership concerns, together with his horses, carts, cattle, and utensils of husbandry, unto his sons *Thomas*, *James*, and *John*, their executors, administrators, and assigns, as tenants in common. And, after bequeathing certain specific legacies, the testator gave and bequeathed all the rest, residue, and remainder of his personal estate and effects unto his three sons, *Thomas*, *James*, and *John*, their executors, administrators, and assigns, as tenants in common, and not as joint tenants; and appointed his said three sons, *Thomas*, *James*, and *John*, residuary legatees and joint executors of his will, they paying and discharging all

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his just debts and funeral expenses, and the legacies bequeathed to his two daughters, as also the annuity by the will bequeathed to his son *Joseph*, and another annuity therein mentioned to be secured by the bond of the testator. After setting out the remainder of the petition to the effect stated in the report of the hearing before the Court of Review, *ante*, vol. i. p. 418, the special case proceeded to state, that the petition was heard on the 14th day of January last; when it was contended, on behalf of the assignees, that the legacy in question was not vested in the petitioner by the will of her father, but was contingent and payable only in the event of her marriage, and not otherwise; but that nevertheless the Court declared and adjudged the same to be a vested legacy, and that it still remained chargeable on the said real estates, and thereupon ordered them to be sold and applied in the manner and form as prayed by the petition.

Mr. *Wigram*, and Mr. *Purvis*, for the appellants. Even if the question were whether the legacy was vested, as regards the testator's personal estate, the decision of the Court below must be reversed; for the only ground on which it could be considered vested would be, either that there was a gift of the legacy, distinct from the direction for payment,—or that the intermediate interest was bequeathed to the legatee. But, although these circumstances may have been held sufficient in some cases to vest legacies which would otherwise be contingent, yet it has been expressly decided, that they have no such effect where the contingency is that of marriage, which may never happen at all; *Atkins v. Hiccocks* (a). But

(a) 1 Atk. 500.

the only question here is, whether the legacy is vested, as regards the real estate; and that question is unaffected by the separation of the gift from the direction to pay, or by the gift of intermediate interest; *Mackell v. Winter* (a); *Pearce v. Loman* (b).

The whole case of the respondents, therefore, depends upon the direction, that the testator's daughters should let their legacies remain, continue and be in the hands of his executors at interest, till the daughters married. This direction, however, was necessarily introduced, to enable the executors to postpone the investment of a specific fund, to answer the payment of interest until the contingency was determined, and cannot therefore be properly considered as controlling the nature of the bequest itself.

Mr. Tinney, Mr. Swanston, and Mr. Sydenham Clarke, for the respondents. In *Booth v. Booth* (c) Lord Alvanley considered the decision in *Atkins v. Hiccocks* (d) to proceed upon the circumstance that the marriage was to be with the consent of certain persons, which imported a condition; and there is no valid distinction which will reconcile the decision in *Booth v. Booth* with that in *Atkins v. Hiccocks*, except the distinction between a marriage with consent, and a marriage generally. Besides, the present case falls within the rule, that where a legacy charged upon real estate is payable at a future day, and the payment is postponed for other objects than the benefit of the legatee, the legacy will be payable, notwithstanding the legatee may die before the time of payment arrives; *Duke of Chandos v.*

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(a) 3 Ves. 543.

(b) 3 Ves. 135.

(c) 4 Ves. 406.

(d) 1 Atk. 500.

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*Talbot* (a); *Dawson v. Killet* (b); *Bayley v. Bishop* (c). Independently of these authorities, the direction, that the daughters should let their legacies remain in the hands of the executors, would be sufficient to determine the construction; since, unless the legacies belonged to the daughters, how could they give any permission respecting them. The postponement being for the personal benefit of the sons who have died is now at an end, and the petitioner is entitled to have the legacy raised and paid to her. They also cited *Thornhill v. Hall* (d); *Watkins v. Cheek* (e); and *Murkin v. Phillipson* (f).

Mr. Wigram, in reply. The principle, that a legacy shall be considered vested, if the payment be postponed for the benefit of the estate, has never been applied to a bequest depending on an event which may not happen; but has reference only to those cases, where the event must happen, provided the legatee lives till a definite period. The authority of *Booth v. Booth* (g) has been much weakened by subsequent cases, and the decision there was expressly grounded on the circumstance of the bequest being residuary.

LORD CHANCELLOR.—The general rule, no doubt, is, that where a legacy is to be raised out of lands at a future day, or upon a contingency, and the legatee dies before the time arrives, or the contingency is determined, the gift fails. It does not however appear to me, that upon the true construction of the will, this rule has any application to the legacy now under consideration. I will

(a) 2 P. W. 601.

(b) 1 Bro. C. C. 119.

(c) 9 Ves. 6. See also *Poole v. Terry*, 4 Sim. 294.

(d) 2 Cl. &amp; Fin. 22; 8 Bli. N. S. 88.

(e) 2 S. &amp; S. 199.

(f) 3 Myl. &amp; K. 257.

(g) 4 Ves. 406.

first consider the bequest, independently of the direction for payment. The testator had six children, four sons, and two daughters. To each of his daughters he gives the sum of 2000*l.*; for securing which two legacies and the interest thereof he charges, and makes chargeable, his property in Fisher Street and at Murrell Hill. He then gives to two of his sons the property in Fisher Street, as tenants in common in fee, subject nevertheless and charged and chargeable for securing the legacies, and gives the property at Murrell Hill to another son in fee, subject and charged in the same way. He gives his residuary estate to his three sons, and appoints them residuary legatees and executors, they paying and discharging his debts, funeral expenses and legacies. So far therefore as this portion of the will goes, there would be no doubt of the daughters being entitled *in presenti* to their legacies. But, after bequeathing the legacies, the testator adds, "for securing which said two legacies and the interest thereof till the same shall be paid by my executors, and which I hereby order and direct shall be paid *as hereinafter mentioned*, I hereby charge and make chargeable my houses, shops, warehouses, and premises, which I now occupy at the lower end of Fisher Street, and also my closes at Murrell Hill;" and then he directs his daughters to let their legacies remain in the hands of his executors at interest, till they, his daughters, should happen to marry; and that then and in such case, and upon such marriage taking place, the legacy or legacies should be paid, upon such her or their marriage or marriages, to her or them by instalments, his executors contributing to such payment equally share and share alike. And the question is, whether this direction destroys the prior gift, or only applies to the mode of enjoyment. Now it

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does not appear to me inconsistent, to hold, that the testator intended his daughters to take a vested interest in the legacies, although he, for the personal benefit of his sons, directed that the latter should have the use of the money until a certain event happened, upon their paying interest upon the amount in the meantime. This indeed seems to be the only construction, which will render the different parts of the will consistent; for, according to the other interpretation which has been contended for, the daughters, who are directed to let their legacies remain in the hands of the executors, would have no option in the matter. The event in question has not happened; but the persons who are to have the use of the money have ceased to exist; and it is contended, therefore, that if the direction were introduced solely for their personal benefit, the object of postponing the payment of the legacy would be at an end, and the legatee would be now entitled to receive it. On that point, however, I give no judgment, deciding merely that the legacy was vested, and that the decision of the Court of Review must be affirmed.

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It is not necessary, that the Commissioner should certify that the debt of a creditor, proposed to be substituted for that of the petitioning creditor, has been incurred not anterior to the debt of the petitioning creditor; if the Court is satisfied of the fact by other evidence.

Ex parte PUBERY.—In the matter of PROFFIT.—

THIS was a petition to substitute the debt of a creditor for that of the petitioning creditor, the latter having been expunged by the Commissioners as fictitious, and therefore insufficient to support the fiat. It appeared from the affidavit in support of the petition, that the debt proposed to be substituted was incurred not anterior to the debt of the petitioning creditor.

Mr. J. Russell, in support of the petition.

Mr. *K. Parker*, *contra*, objected that under the 18th section of the act of parliament (a), the Commissioner should not only have found the debt of the petitioning creditor to be insufficient to support the fiat, but should also have certified that the debt proposed to be substituted was incurred not anterior to the debt of the petitioning creditor. In *Ex parte Hunter* (b), where the Commissioners had omitted to certify this fact, the Court referred it back to them, to inquire whether the debt proposed to be substituted was anterior, or not.

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Sir JOHN CROSS.—In the case cited, the Court had no knowledge whether the debt to be substituted was anterior, or not, to that of the petitioning creditor; and they therefore referred it to the Commissioners to ascertain that fact. In the present case, the Court is sufficiently informed of that fact, by the affidavit in support of the petition. The words of the 18th section are, if the debt of the petitioning creditor “be found insufficient to support a commission,” the Lord Chancellor may, “upon the application of any other creditor, having proved any debt sufficient to support a commission, provided such debt has been incurred not anterior to the debt of the petitioning creditor, order the commission to be proceeded in.” The act does not require the certificates of the Commissioners as to these facts. It is sufficient, therefore, if the Court is satisfied of them by other evidence.

(a) 6 Geo. 4. c. 16.

(b) 2 Deac. & C. 507.



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Where an assignee had sold his debt to a creditor who was adverse to the fiat, he was ordered to be removed, and a new one chosen in his room, and he was restrained from voting in the choice of the new assignee.

Ex parte STAGG and others.—In the matter of  
BURTON.—

**THIS** was the petition of several creditors for the removal of an assignee, and the choice of a new one in his room, on the ground that he had sold his debt to another creditor who was adverse to the fiat, and who had also bought up the debts of several other creditors. The petitioners also prayed, that the assignee, if removed, might be restrained from voting in the choice of the new assignee.

Mr. *Anderdon* appeared in support of the petition.

Mr. *Swanston*, for the assignee, consented to his removal, but not that he should be restrained from voting in the choice of the new assignee.

Sir JOHN CROSS.—As the assignee might, under the peculiar circumstances of this case, abuse the right of voting in the choice of the new assignee, I think he ought to be restrained from exercising that right. I admit that a creditor, notwithstanding he has sold his debt, may in general vote in the choice of assignees; but, on the present occasion, I think the Court ought to interfere and prevent him from voting.

ORDERED, that the assignee should be removed, and a new one chosen in his room, and that the removed assignee should be restrained from voting in such choice; and that if the other assignees desired to withdraw, then that there should be an entire new choice of both assignees.



Ex parte BURDIKIN.—In the matter of MILLS and  
SEED.—

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THIS was the petition of a creditor for annulling a separate fiat, in favour of a joint fiat. It appeared that the separate fiat was issued against *Seed* on the 20th May, and the joint one against both bankrupts on the 22d; but the Commissioners had proceeded to adjudicate under the joint fiat, notwithstanding the separate fiat was the first sued out.

A separate fiat was annulled in favour of a subsequent joint one, notwithstanding the separate estate was more important than the joint estate, and one of the bankrupts intended to dispute his bankruptcy.

Mr. *Swanston*, and Mr. *Archbold*, were in support of the petition.

If, under such circumstances, an inspector should become necessary to protect the interests of the separate creditors, the appointment will be at the expense of the joint estate.

Mr. *Anderdon*, for the petitioning creditor under the separate fiat. The petitioner in this case, notwithstanding he now applies to supersede the separate fiat, ran a race with my client for a separate fiat in the first instance. There was a firm of *Mills* and *Seed* at Manchester, which was only subsidiary to the more important separate trade of *Seed* in London. We admit the general rule, that a separate fiat is annulled to give effect to a joint one; but still it is always a matter for the discretion of the Court. Now, in the present case, the separate estate and dealings of *Seed* are much more important than the estate or dealings of *Mills* and *Seed*; and moreover *Mills* contests his own bankruptcy. If the Court should annul the separate fiat, it will at all events order an inspector to be appointed to watch over the interests of the separate creditors of *Seed*.

Sir JOHN CROSS.—It appears, that both these fiats were regularly sued out, as well by the respondent, as

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by the petitioners ; and that the Commissioners thought right to adjudicate under the joint fiat, in preference to the separate fiat previously issued. The separate fiat, therefore, has become utterly useless. In my opinion, the Commissioners would have more strictly discharged their duty, if they had proceeded to adjudicate on the fiat first in order ; leaving it for this Court to do what was proper in disposing of the two fiats. I do not see any thing in this case to prevent the application of the general rule, to annul a separate fiat, in favour of a joint one. If *Mills* succeeds in upsetting the joint fiat against himself, it will nevertheless be good as a separate fiat against *Seed*, under the 16th section of the act of parliament (a), by which it is enacted, that “ in every commission against two or more persons it shall be lawful for the Lord Chancellor to supersede such commission as to one or more of such persons, and the validity of such commission shall not be thereby affected as to any person, as to whom such commission is not ordered to be superseded, nor shall any such person’s certificate be thereby affected.” With respect to the appointment of an inspector of *Seed’s* separate estate, that may be ordered hereafter, if the necessity should be made apparent to the Court ; and in that case I think the appointment should be at the costs of the joint estate, as the separate fiat was sued out first.

ORDERED, that the separate fiat should be annulled,  
at the costs of the joint estate.

(a) 6 Geo. 4. c. 16.

Ex parte JOHN TARLETON.—In the matter of JOHN  
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*Serjeants'  
Inn Hall,  
June 15.*

**THIS** was a petition of the bankrupt, praying that the assignee and the solicitors to the fiat might be ordered respectively to produce to the petitioner, or to his attornies, upon oath, all books, papers and writings in their custody, relating to his property, and to the dealings and transactions of the assignees therewith.

The petition stated, that by an order (*a*) of this Court, made on the 20th November 1839, it was ordered that the Commissioners should cause a meeting to be holden, of which due notice was to be published in the London Gazette, at which meeting the bankrupt was to be at liberty to surrender himself under the commission, and make a full and true disclosure and discovery of his estate and effects, and finish his examination; and the Commissioners were to enter upon the proceedings the reason which prevented the bankrupt from surrendering and finishing his examination within the time before appointed for that purpose; and the creditors of the bankrupt who should be present at such meeting were to be at liberty to interrogate and examine him touching the disclosure and discovery of his estate and effects, as they should think fit; that the costs of the meeting should be paid by the bankrupt; and that the further consideration of the other matters of the petition should be adjourned until further order; with liberty for any of the parties to apply to the Court as they should be advised.

A bankrupt, who was abroad when the commission was issued, after the lapse of many years, returned to England, and obtained an Order for leave to surrender and pass his last examination. He accordingly went down from London to Liverpool to attend the Commissioners for this purpose, but no one expressed any wish or intention to examine him; and the Commissioners, after taking his surrender, adjourned the last examination for three months, but not at the request of the bankrupt. *Held*, that the bankrupt's non-attendance at the adjourned meeting did not deprive him of his right to an Order on the assignees, under the 132d sect. of 6 Geo. 4. c. 16., to declare how they had disposed of his real and personal estate.

That the petitioner, who was upwards of eighty-five

(*a*) The facts, under which this Order was made, appear in a former report of the case, 4 Deac. 178.

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years of age, and paralysed on one side of his body,—notwithstanding such age and infirmity, and contrary to the advice and recommendation of his medical attendant,—in compliance with the above order, attended at Liverpool on the 7th July last, and duly surrendered himself to the three surviving Commissioners acting under the renewed commission; but the examination of the petitioner was adjourned until the 7th October last. That in consequence of the exposure of the petitioner to the inclemency of the weather, in journeying to Liverpool for such surrender, he was attacked by the gout in both his knees, and hath since become very much debilitated in body.

That dividends to the amount of 17s. 8d. in the pound had been declared and paid upon the debts proved under the commission, and that a very large surplus of the bankrupt's property was in the hands or under the power and control of the assignees, after payment in full of the debts proved under the commission.

That on the 8th December last, the bankrupt's solicitor applied to the solicitors to the assignees to inspect the accounts of the receipts and payments of the assignees, and also all books, papers, writings, deeds and documents relating to the bankrupt's property, and any dealings therewith in their possession or power. To this application the solicitors of the assignees returned for answer, that all the documents, which belonged to the bankrupt, and had come into the hands of the assignees, should be ready for his inspection at any time at their office, for the purpose of enabling him to pass his examination, which they complained that he had not yet done, nor assigned any reason for not attending the meeting appointed by the Commissioners at his request

for the purpose. That the bankrupt's solicitor, not deeming this answer satisfactory, on the 22d January last made a second application to the assignees themselves, for the inspection of the above mentioned documents; to which last application one of the assignees replied, that none of the books or papers relating to the bankrupt's estate were ever in his possession, and that he did not even know in whose custody they were, or ever had been. That the bankrupt's solicitor on the last mentioned day applied also to the Commissioners acting under the renewed fiat, to order the assignees, or their solicitor, to allow the bankrupt's solicitor to inspect the above mentioned documents. Upon this application, the Commissioners referred the bankrupt's solicitor to a former answer given by them on the 25th November last to an application for a summons against the assignees, which was as follows:—"We do not think ourselves called upon to comply with the bankrupt's request for the summons upon the assignees mentioned in his application, he not having appeared at the adjourned meeting, or passed his examination; and we feel this the more, in consequence of the substance of his application being part of the matter of his petition to the Court of Bankruptcy, which they have reserved for their future consideration; and we are willing to direct the assignees to allow the bankrupt to have access to every paper or document which belonged to him, and which have come into their hands, to enable him to finish his examination."

The petitioner alleged, that he was abroad when the original commission issued, and that he did not return to England until the year 1833, and that, as he never had possession of, or control over, any part of his pro-

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perty since the assignees took possession of it under the commission, any examination of the bankrupt was wholly uncalled for and unnecessary.

Since the above application to the assignees, one of them had been removed, and the other died on the 20th January last; and a new assignee had been appointed in the room of the late sole surviving assignee.

The petitioner alleged, that all the books, papers, writings and documents relating to his property, and to the dealings and transactions of the several assignees therewith, were in the possession and custody of the solicitors under the fiat, or of the new appointed assignee; and that the petitioner was wholly unable to ascertain the particulars of the accounts, dealings and transactions of the several assignees under the commission, without an inspection of such books, papers and documents.

Mr. *Swanston*, and Mr. *J. Russell*, in support of the petition. By the 101st section of the Bankrupt Act, the assignees are directed to keep an account, wherein they are to enter all property of the bankrupt received by them on account of the bankrupt's estate; which account every creditor, who shall have proved, may inspect at all seasonable times. And the 132d section directs, "that the assignees shall, upon request made to them by the bankrupt, declare to him how they have disposed of his real and personal estate, and pay the surplus, if any, to such bankrupt." Has not the bankrupt then a right to see the account, which the assignees are thus directed to keep, of the property received by them on account of his estate? If it should be contended on the other side, that

the assignees are only bound to account to the bankrupt, in the event of there being a surplus of his estate, we say, that there is no such condition in the act of parliament. The assignees are positively directed to account to the bankrupt; and then, if there should be a surplus, they are directed to pay it over to him. The condition of there being a surplus merely relates to the payment of it to the bankrupt, not to the declaration which the assignees are required to make to him how they have disposed of his real and personal estate. But there has been already a dividend of 17s.8d. in the pound; so that it is highly probable, if the bankrupt's estate had been properly managed, that there would have been a considerable surplus. Moreover, as there has been a new assignee appointed in the place of the former ones, there can be no objection on his part to permit the inspection of these accounts; for he is not answerable for the acts of his predecessors, although it may turn out that they have kept improper accounts.

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Mr. *Girdlestone*, and Mr. *Sutton Sharpe*, for the assignee. The commission against this bankrupt was issued so long ago as in the year 1815; and since that period the bankrupt has done all that he can in obstructing the proceedings of the assignees, and did not even surrender to the commission until twenty-four years after it had issued. On the 20th November 1839, however, the bankrupt obtained a special Order to permit him to surrender; but the Court then declined to make any Order for him to inspect the accounts of his assignees, directing merely that that part of his petition which prayed for an inspection of their accounts should stand over for further consideration.

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The bankrupt has now, it is true, surrendered, but he has not passed his last examination. They put it on the other side, as if the present assignee had no intention to examine the bankrupt; and that a bankrupt is not to be prevented from inspecting the accounts of his assignees, because the assignees do not choose to examine him. But it appears expressly in the affidavits, that when the bankrupt surrendered before the Commissioners on the 7th July last, he prayed for further time to finish his examination; and this appears, also, by the memorandum of his surrender filed with the proceedings; for it states, that the Commissioners, at his request, adjourned the examination to the 7th October following. The other side have relied on the 132d section of the Bankrupt Act. But if you construe that section in connection with the 116th section, it will appear that the bankrupt has no right to call for an account from his assignees, until he has finished his examination. The 116th section provides, that the bankrupt, after he has surrendered, may inspect his books in the presence of his assignees, for the purpose of passing his last examination; and then the 132d section, taking it for granted that the bankrupt has finished his examination, which has assisted his assignees in collecting his effects, enacts, that they shall declare to him how they have disposed of his real and personal estate. [Sir *John Cross*. The 116th section appears to be confined to the *bankrupt's own* books, papers and writings. The only question is, whether the bankrupt has a right, in the present stage of the proceedings, to call upon the assignee to declare what has been done with his real and personal estate. It does not appear that he made any application for that purpose, before the former Order.] In the face of that Order,

suspending all further proceedings under the former petition, the Court can make no Order on the present petition, except that it shall be brought on with the further hearing of the other. Until the bankrupt shall have finished his examination, he is not entitled to the Order he asks on this petition. While the bankrupt is in any default himself, he has no right to the interposition of this Court against his assignees; more especially when he calls for an inspection, not merely of his own books, but of all the books, papers, writings and documents relating to any dealings and transactions of his assignees. There are two distinct stages under a fiat, in which the bankrupt stands in quite a different position; the 1st is, *before* he has passed his last examination; the 2d is, *after* he has completed such examination. Until he passes his examination, he is a defaulter, and can be heard for no purpose, except to enable him to perform this important duty required of him. It appears from the bankrupt's own statement in the petition, that his last examination was adjourned to the 7th October; but the bankrupt does not state why he did not attend on that day. The fact is, that the Commissioners met on that day, pursuant to their adjournment, when the bankrupt did not think proper to attend; and he nowhere assigns, either in his petition, or his affidavit, any reason or excuse for his absence. The bankrupt has evaded doing what he was required to do by the former Order, and he has therefore no right to any Order on this petition.

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Mr. *Spence*, for the solicitors to the assignee, submitted, that they were merely the depositories of the

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documents for their client, the assignee—and that, there being no default on their part, he had only to ask for the costs of their appearance.

Mr. *Swanston*, in reply. It was not intended to serve the solicitors with the petition; for we ask for no relief against them. If, however, the solicitors have been served, they must of course have the costs of their appearance.—In regard to the imputation that has been thrown out against the bankrupt, of obstructing the proceedings of his assignees, some explanation may be considered necessary. When the commission issued against the bankrupt, he was abroad, and the summons was merely left at his house in England. In 1816 he presented a petition to supersede the commission, when an issue was directed to try the bankruptcy, and all proceedings under the commission were stayed (*a*). The verdict was against the bankrupt; but, having the best advice that the commission was fraudulent, he applied to the Lord Chancellor for a new trial; which was refused merely on a technical ground. In 1827 the bankrupt brought an action against his assignees for the purpose of disputing his bankruptcy; but they obtained an injunction from the Lord Chancellor to stay all proceedings in the action. He then was advised to file a bill in the Exchequer against the assignees, who took a formal objection to that proceeding; and the Court decided, that, the question at issue being a matter in bankruptcy, the Court of Exchequer could not deal with it.

Sir JOHN CROSS.—When the bankrupt attended before the Commissioners under the renewed fiat on the

(*a*) See *Ex parte Tarleton*, 19 Ves. 464.

7th July last, it does not appear that any one question was put to him, although he had travelled all the way from London to Liverpool, for the purpose of surrendering himself and passing his last examination. It would seem, therefore, that there was no intention on the part of the assignees to examine him as to the state of his affairs. Is there any proof that the bankrupt then made any special application to the Commissioners to postpone the examination?

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Mr. *Girdlestone*. That appears from the memorandum of adjournment signed by the Commissioners, which states that the examination was adjourned at the bankrupt's own request.

Sir JOHN CROSS.—That is only the common form of the memorandum which the Commissioners always sign when the examination is adjourned.

Mr. *Swanston*. The bankrupt returned to England in 1833; and although the assignees knew of that fact, yet they took no steps whatever to examine him or compel his surrender, until the bankrupt himself applied for leave to surrender. When this Court makes an Order for that purpose, and the bankrupt has surrendered, he is then entitled to all the rights which he would have been entitled to, if he had surrendered in the first instance. The bankrupt was perfectly ready and willing to be examined, when he surrendered on the 7th July last; and it is not his fault, that he has not been examined. The 132d section is remedial in its nature, and founded on the clearest principle of justice. We trust, therefore, that the Court will think the bankrupt is en-

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titled to all he asks on the present occasion, as a measure of justice only due to him, under the peculiar circumstances in which he is placed.

Sir JOHN CROSS.—This would be a very simple case, if it were not for the great time that has elapsed since the issuing of the commission, and the many circumstances that have been pressed into the discussion of the case. If a bankrupt makes a request to his assignees to declare what has been done with his estate, and they refuse to render him an account, he has an undoubted right to come to this Court to complain of such refusal. In the present instance, the bankrupt's estate has paid dividends to the amount of 18s. in the pound. It seems very reasonable, therefore, that after nine-tenths of his debts have been thus discharged, he should see the accounts of the assignees; it being highly probable that he would have been solvent but for this commission. I regret that the assignee comes here with so determined an opposition to so reasonable a proposition. He says, that the bankrupt has kept the assignees at arm's length in every step of the working of this commission: but I see no ground to doubt that his conduct has been *bonâ fide* throughout, and is free from any imputation of fraud. There was some ground, in my opinion, for the litigation that has taken place; for it appears to have been once a doubtful question, whether the commission was valid; though I am bound to conclude, from the result, that the commission was rightfully issued. When the bankrupt returned to England, he applied for leave to surrender to the commission that had been issued against him in his absence, and the Court granted him permission to do so. He took an attorney with him, and went

all the way from London to Liverpool to fulfil his duty in this respect; but when he surrendered, no one appeared who was desirous of asking him a single question; the Commissioners had none to ask; and the only matter for their consideration seems to have been, how to record their proceedings, and adjourn the meeting. A full examination was impracticable, after a lapse of thirty years, relative to an estate which had produced 65,000*l*. It is quite manifest, indeed, that no such examination was required; since no one desired to examine him. As the bankrupt, however, went down to Liverpool on purpose to tender himself for examination, it is a pity that the assignees did not then think proper to examine him. The Commissioners disposed of the business in the common form, by adjourning the meeting; and it nowhere appears that the bankrupt made any request for further time to pass his examination; for, as to the statement on the proceedings that the adjournment took place at his request, that is nothing but the usual form of the memorandum of adjournment, and not the record of a substantial fact. I am of opinion, that, in point of law, the bankrupt is entitled to have an account of how the assignees have disposed of his estate. I should have doubted, on the face of this petition, whether the present assignee had in fact refused to render an account to the bankrupt, and to produce the documents required; but when I see the opposition which has been made to-day, I must take it for granted that he has so refused; and I confess, I do not think it just, that an assignee, who ought to be indifferent between the parties, should offer so stout a resistance to what appears to me only a reasonable demand.

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TARLETON.

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TARLETON.

Mr. *Girdlestone* then submitted, that the Order to be made by the Court must be, according to the directions of the 132d section of the Bankrupt Act, and merely order the assignees to declare generally, "how they have disposed of his real and personal estate."

Mr. *Swanston* contended, that he was entitled to an Order, according to the prayer of the petition, and comprehending all the property of the bankrupt, whether disposed of by the assignees, or continuing in the hands of the present assignee.

The ORDER was, that the assignees should declare how they have disposed of the real and personal estate of the bankrupt, and produce to him and his agents all the books, papers and documents in their possession or power relating thereto, with liberty to take copies thereof or extracts therefrom; and that the petition should be dismissed, with costs, as against the solicitors. The costs of the bankrupt and the assignees to be paid out of the estate; but the assignees to be permitted to set off any other costs, which the bankrupt was bound to pay to them, of the proceedings in any other Courts.

Ex parte WALLIS.—In the matter of REBECCA

DREWRY.—

1841.

Westminster,
June 15.

THIS was a petition of the public officer of a joint stock banking company, for the usual Order as equitable mortgagees of some property in which the bankrupt had a life interest, and also claiming a lien on some shares held by the bankrupt as one of the members of the company. The act of parliament under which the company were incorporated provided, that the company should have a lien on the shares of any proprietor who became indebted to the bank.

The bankrupt was a member of a joint stock banking company, and kept an account with the bank as a customer, being, at the time of his bankruptcy, indebted to the bank in a considerable balance, beyond the value of his shares in the bank and some other property on which the company had a lien. *Held*, that this balance constituted a proveable debt.

Mr. *Anderdon*, in support of the petition.

Mr. *Swanston*, *contra*, took a preliminary objection to the petition, that it did not show that the company was a banking company, within the provisions of the 7 Geo. 4, c. 46.

Mr. *Anderdon*. Although it does not expressly appear so in the petition, it does so appear in the evidence, and that will accomplish the object of the petition.

Sir JOHN CROSS.—I think it should appear so by averment in the petition. But the petitioner may have leave to amend.

Mr. *Swanston* then waived the objection.

Mr. *Anderdon*. The point raised in the present case was expressly decided in *Ex parte Plant* (a), where the

(a) 4 Deac. & C. 160.

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Ex parte
Wallis.

lien of a company on the shares of one of the proprietors was claimed, not under the provisions of an act of parliament, but merely under a clause in the deed of settlement. In *Ex parte Connell* (a), also, the same point was determined. [Sir *John Cross*. In that case the only question was, whether the shares were to be considered to belong to the joint, or the separate, estates of the bankrupt partners.]

Mr. *Swanston*. The first question here is, whether this is a proveable debt. Now, according to the principle on which *Ex parte Sillitoe* (b) was decided, we say, that the debt is not proveable; for it was not contracted in respect of any dealings between trade and trade, but in the ordinary course of dealing between customer and banker. In *Ex parte Cook* (c) the same principle was acted upon, where it was decided, that, although one member of a firm, who carried on business on his separate account, could prove for the amount of goods supplied by him to the firm, he could not prove for money advanced. There is a difference between an account to be rendered by a trust estate, and an action between party and party. The amount of the debt claimed to be due from the bankrupt to this banking company cannot be properly ascertained, until an account is taken of what was the bankrupt's share in the profits of the bank. The statute (d) could never mean that the banking company should prove the amount of the debt due from one of its partners, when that partner has a share in the profits of the company. A private agreement between partners is not to control

(a) 3 Deac. 201.

(b) 1 G. & J. 374.

(c) Mont. 228.

(d) See 1 & 2 Vict. c. 96, ss. 1 and 4, and 3 & 4 Vict. c. 111.

the bankrupt law. No man can take advantage of any provision depending on his own bankruptcy.

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Mr. *Anderdon*, in reply, referred to the recent case of *Ex parte Davidson* (a), as being precisely in point. There, a member of a joint stock banking company kept an account with them as his bankers, and at the time of his bankruptcy was indebted to them in a large balance on such banking account, the company being then also considerably indebted to various other persons; and it was held, that the company had a right of proof against the bankrupt for the balance due on such banking account.

Sir JOHN CROSS.—The right of the banking company, as equitable mortgagees, to an Order for the sale of the bankrupt's life interest in the property in question is not disputed; and, therefore, that Order is of course. And with regard to their lien on the bankrupt's shares in the bank, and their right of proof for the amount of their debt, after deducting the value of those shares, I continue of the same opinion as I expressed in *Ex parte Davidson*, and that the balance due to the bank is a proveable debt. The Order may be taken for the sale of those shares, as well as of the bankrupt's life interest in the other property, with liberty to prove for the residue.

Usual ORDER.

(a) 1 Mont. Deac. & D. 648.

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Coram Lord
Lynch, C.
Nov. 4 and
Dec. 8.

A partnership
firm mortgage
part of the
joint estate to
secure a joint
debt, and by the
mortgage deed
covenant jointly
and severally
for payment
of the debt.
Held, that, on
their bank-
ruptcy, the
mortgagee might
prove the whole
debt against
each separate
estate, without
giving up his
security (a).

Ex parte SHEPHERD and others.—In the matter of JOHN
PLUMMER and WILLIAM WILSON.

THIS was an appeal from the Court of Review (b) to
the Lord Chancellor on the following

SPECIAL CASE.

Previously to the issuing of the commission, the bank-
rupts carried on the business of West India merchants
in partnership, under the firm of *Plummer and Wilson*,
and the firm was indebted to *George Joad*, ship owner,
in the sum of 2000*l.* for money lent, and also in the sum
of 5998*l.* 13*s.* 4*d.* for the freight of ships of which *George*
Joad was the managing owner. As security for the sum
of 2000*l.* money lent, and for any further advances which
George Joad might make to the firm, and for all other
sums in which the bankrupts might become indebted in-
dividually to *George Joad*, the bankrupts executed two
several indentures, dated respectively the 2d and 8th
days of March 1830, and thereby assigned to *George*
Joad certain sums due to the firm of *Plummer and*
Wilson, and charged on plantations in the island of
Jamaica, called Maverley and Mount Zion, and the
slaves, stock, and other appurtenances thereunto be-
longing, together with the securities for the same.
These indentures respectively contained a covenant in
the following words: "And the said *John Plummer and*
William Wilson do hereby, for their heirs, executors,
and administrators, and each of them respectively doth
hereby, for himself, his heirs, executors, and adminis-
trators, covenant, promise, and agree to and with the
said *George Joad*, his executors, administrators, and

(a) See note, 1 Mont. Deac. & D. 113.

(b) See the former Report, 1 Mont. Deac. & D. 101.

assigns, that they the said *John Plummer*, and *William Wilson*, their heirs, executors, or administrators, or some or one of them, shall well and truly pay, or cause to be paid, unto the said *George Joad*, his executors, administrators, and assigns, the said sum of 2000*l.* sterling aforesaid, and the interest thereof from the said 1st day of January now last past, after the rate aforesaid, and also all and every further sum and sums of money which the said *George Joad*, his executors, or administrators, shall or may, at any time or times hereafter, advance, lend, or pay, or become liable to pay to or on account of the said *John Plummer* and *William Wilson*, as such copartners as aforesaid, or in which the said *John Plummer* and *William Wilson*, as such copartners as aforesaid, may become indebted to the said *George Joad*, his executors, or administrators, and the interest thereof after the rate aforesaid, on the days, times, and in manner hereinbefore limited and appointed for the payment of the same, not exceeding as aforesaid, without any deduction or abatement whatever, according to the true intent and meaning of the proviso or agreement for redemption hereinbefore contained, and of these presents."

The special case then proceeded to set out another indenture of a similar description, the purport of which was to secure, by an assignment of a mortgage upon another estate in Jamaica, the sum of 5998*l.* 13*s.* 4*d.*, and such other sums as might become due for freight, not exceeding 10,000*l.* in the whole. It then stated, that the commission issued on the 2d December 1830, when the firm was indebted to *George Joad*, for money lent, in the sum of 10,014*l.* 7*s.* 5*d.*,—and for freight in the sum of 10,742*l.* 4*s.* 5*d.*: that on the 16th December 1831 *Joad* applied

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SHEPHERD
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to the Commissioners to prove against each of the separate estates of the two bankrupts the aggregate amount of these two sums, but that the proof was rejected; the major part of the Commissioners being of opinion that it ought not to be admitted, without a previous sale of the property which had been assigned to *Joad* by the several indentures for securing such debts; that, upon *Joad* presenting a petition to the then Lord Chancellor, praying that he might be permitted to prove these sums against the separate estate of the bankrupt *Plummer*, without such previous sale,—it was ordered upon the hearing, (which took place on the 16th June 1832,) by consent, that *Joad* should be at liberty to go in under the commission, and prove for the amount, without a previous sale, and receive a dividend; he undertaking by his counsel to refund such dividend, in case the Court should be of opinion that he ought to have sold or realized the securities before proof, and to prove for the deficiency only; the consideration of the petition being in the meantime adjourned.

Mr. *J. Russell*, and Mr. *Bagshawe*, for the appellants, argued to the same effect as they had done in the Court below (a).

Mr. *Swanston*, and Mr. *Hull*, for the respondents, the executors of *George Joad*. The creditor has a right to elect, whether he will prove against the joint or the separate estate; and, having elected to prove against either, there is nothing to prevent him from retaining a security upon the other. It had been decided in the early cases, that a creditor might prove, without giving up a security entered

(a) See 1 Mont. Dea. & D. 103.

into by a third person; *Ex parte Bennet* (a), *Ex parte Parr* (b); and the same principle obviously applies to every case, where the creditor only seeks to prove against an estate which is not affected by his security, and consequently to cases in which the security forms part of the joint estate, while the proof is tendered only against the separate estate; or *vice versâ*. The express point indeed was not decided, before the case of *Ex parte Peacock* (c); but if there were any doubt as to the principle, that case is a conclusive authority on the subject, and applies entirely to the present case; there being no pretence for saying that the judgment there turned upon the circumstance of the partner having died, who had given the security. That fact was neither relied upon in the argument, nor referred to in the judgment, of which therefore it cannot be considered as forming an element.

The decision, therefore, of the Court of Review cannot be affirmed, without overruling *Ex parte Peacock*, as well as the subsequent cases which have been decided on the authority of that case, and those in which the rule there established has been assumed and taken for granted. Of the latter description is the case of *Ex parte Freen* (d), decided shortly after *Ex parte Peacock*; and so are also the recent cases of *Ex parte Rodgers* (e), and *Ex parte Connell* (f); while *Ex parte Bowden* (g), is a case of the former kind. *Ex parte Davenport* (h) may be also mentioned, as showing that no change has taken place in the opinion of one of the learned judges of the Court below, who took that view of

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SHEPHERD
and others.

(a) 2 Atk. 528.

(b) 1 Ro. 76.

(c) 2 G. & J. 27.

(d) 2 G. & J. 250.

(e) 1 D. & C. 38.

(f) 3 M. & A. 581; 3 Dea. 201.

(g) 1 D. & C. 135.

(h) 1 M. D. & D. 313.

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and others.

the case which we are now advocating. And, besides the cases already referred to, there are others showing, that, although *Ex parte Peacock* (a) is the first express authority on the point, the principle of the decision there was by no means new. Such are, among others, those of *Ex parte Goodman* (b), *Ex parte Stanborough* (c), *Ex parte Smith* (d).

Mr. Bagshawe, in reply. *Ex parte Bennet* (e), *Ex parte Parr* (f), and *Ex parte Goodman*, were cases where the security was that of a third party; to cite those cases as authorities for the present, is to beg the question. *Ex parte Rodgers* (g) contains no more than a dictum or suggestion, with which the Order made does not seem in conformity. In *Ex parte Freen* (h), and *Ex parte Connell* (i), the only question was, whether the security was joint or several, and in neither case was the creditor permitted to prove, without selling his security. And, as neither *Ex parte Stanborough*, nor *Ex parte Smith*, can be considered as bearing on the question, and as *Ex parte Davenport* (k) does not profess to decide it, there only remain to be considered the case of *Ex parte Peacock*, and that of *Ex parte Bowden* (l), which was decided on the authority of *Ex parte Peacock*, the circumstances of both cases being the same. Now the report of *Ex parte Peacock* is too short to be relied upon, as showing, that the fact of the estate comprised in the security, not being subject to administration in bankruptcy, was overlooked; and, even if it had been, there is another important distinction between that case and the present,

(a) 2 G. & J. 27.

(b) 3 Mad. 373.

(c) 5 Mad. 89.

(d) 1 V. & B. 518.

(e) 2 Atk. 528.

(f) 1 Rose, 76.

(g) 1 Deac. & C. 38.

(h) 2 G. & J. 250.

(i) 3 M. & A. 581; 3 Deac. 201.

(k) 1 Mont. Deac. & D. 313.

(l) 1 Deac. & C. 135.

for in *Ex parte Peacock* the debt being, as in this case, a debt of the firm, the security was the property of one partner, and not, as here, the property of the principal debtors; and upon that circumstance the Lord Chancellor expressly founds his judgment, saying (a), "The joint estate is primarily liable. The separate estate can only be considered as a surety for the joint estate." How then can this case authorize a creditor to proceed in the first instance against the estates which are secondarily liable, keeping back his security on that, which, according to the Lord Chancellor's judgment, should be first made available?

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SHEPHERD
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LORD CHANCELLOR.—This is a special case, sent under the authority of the act of parliament by the Court of Review for the opinion of this Court. The facts, so far as it is necessary to state them for the present purpose, are shortly these. Messrs. *Plummer* and *Wilson*, who carried on business as West India merchants, were indebted in the sum of 2000*l.* to Mr. *George Joad* for money lent. They were desirous of obtaining further advances; and for the purpose of securing repayment to Mr. *Joad* of the debt of 2000*l.*, and the sums which might become due to him from the firm, and from Mr. *Plummer* personally, they assigned to him a mortgage security, to which they were entitled, upon property in the West Indies, and entered into a joint and several covenant for the payment of the sums advanced and to be advanced, including the 2000*l.*, but not exceeding in the whole the sum of 10,000*l.* That was one transaction. There was a similar transaction, which related to the freight of certain ships, but which it is unnecessary to specify, since

December 8.

(a) 2 G. & J. 29.

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what I have stated is sufficient to explain the whole of this question. Messrs. *Plummer* and *Wilson* became bankrupt. A commission issued against them, and *George Joad* did what he was entitled to do as a joint and several creditor, that is, he offered to prove against the separate estate of each of the bankrupts. It was objected, that he was not entitled to prove, unless he consented to sell or give up his joint security; and that is the point which is now to be decided. Now what are the principles, which are applicable to a case of this description? If a party is a creditor of a bankrupt, and has a security upon his estate, he is not entitled to prove, without selling or giving up his security; and for this reason: the principle of the bankrupt laws is, that all the creditors of the particular estate should participate in it equally, and that one creditor is not to be at liberty to retain a portion of the estate in his hands, and at the same time prove in competition with the other creditors; if he proves, he must surrender or sell the particular security. But if he has a security on the estate of a third person, the principle does not apply, and he may consequently prove his whole debt against the estate of the bankrupt, and apply himself to his security for the deficiency, not receiving in the whole more than twenty shillings in the pound. These are principles recognized and established, and I have stated the grounds on which I think they are established. It is unnecessary to refer to any authorities, but I may mention the cases of *Ex parte Bennett* (a), *Ex parte Parr* (b), and *Ex parte Goodman* (c). Thus far there is no dispute.

The next point is this: In the administration of property under the bankrupt laws, the joint estate and the

(a) 2 Atk. 528.

(b) 1 Ro. 76.

(c) 3 Mad. 373.

separate estate are considered as distinct estates ; and accordingly, when a party offers to prove against the joint estate, having a security upon the separate estate of one of the bankrupts, it has been considered that he is entitled to prove, without giving up his security, on the principle which I have already stated, viz. that the subject of his security does not form part of the estate against which he seeks to prove. This was so decided in *Ex parte Peacock* (a) ; and the counsel for the assignees felt themselves so much pressed by the authority of that case, that they endeavoured to show that there were some special circumstances in it, on which the decision must have been founded ; for instance, that the partner had died who had given the security, and that his estate therefore was to be administered, not under the laws of bankruptcy, but in a different mode. But what was said on the other side in answer to this argument is very conclusive, namely, that the fact adverted to was a mere circumstance in the case, and had no bearing on the principle which was then decided ; it was not put forward in the course of the argument by counsel, nor adverted to by the Court. It appears to have formed no ingredient in the case. The case of *Ex parte Peacock* was decided first by Sir *John Leach*, then Vice Chancellor, and afterwards, on appeal, by Lord *Eldon* ; it has since been followed by the Court of Review, in *Ex parte Bowden* (b), under circumstances very nearly the same. Now what is the present case ? It is the mere converse of *Ex parte Peacock* ; the creditor has here a security on the joint estate, and he proves against the separate estate. Now, *Ex parte Peacock* was decided on the

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(a) 2 G. & J. 27.

(b) 1 D. & C. 135.

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principle, that the joint estate and the separate estate are to be considered as distinct estates in bankruptcy. That principle equally applies to this case. And I am therefore of opinion, that the creditor was entitled to prove against the separate estate, without giving up the security which he had upon the joint estate; that being no part of the estate, against which he proposed to prove. It has been suggested, that this case is to be governed by the rules applicable to the relation of principal and surety. But it does not appear to me, that those rules apply at all to this case. Each party was a principal, by virtue, and by the operation, of the joint covenant. Under these circumstances, I am of opinion, that the representatives of *George Joad* ought not to refund the dividends which they have received, I believe, under an arrangement which was made pending this question. This question has been long in litigation; the Commissioners differed in opinion. It afterwards came before the Court of Review, when that Court consisted of four members. They were equally divided in opinion. The arrangement to which I have referred was then made. The question came on afterwards before the Court of Review, when the number of its members was reduced to two. They still differed; and, under such circumstances, the question has been stated for the opinion of this Court. I think, according to the principle applicable to questions of this kind, that *George Joad* had a right to prove against the separate estate, without giving up his security on the joint estate.

Mr. *Swanston* then asked for costs out of the joint estate, on the grounds that the proceedings had been taken for the protection of that estate, and that the re-

presentatives of Mr. *Joad* had been in the right from the beginning; and argued, that the practice of the Court had been to give costs under such circumstances. But to this

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Mr. *Bagshawe* objected; and

The LORD CHANCELLOR, having taken till the following day to consider the point, finally declined to make any Order as to costs.

December 9.

Ex parte WILLIAM HENRY SMITH and another.—In the matter of THOMAS STYAN and WILLIAM STYAN.

AND

Ex parte THOMAS SMITH, in the same matter.

Serjeants' Inn
Hall,
July 23 & 30.

THESE were the petitions of creditors claiming a lien on certain policies of assurance deposited with them by the bankrupts; and praying the usual Order, as equitable mortgagees, to have the policies sold, the proceeds applied towards the satisfaction of their debts, and to be permitted to prove for the deficiency. The petitioners in the first petition were the executors of one *Sarah Styan*, deceased, who was a creditor of the bankrupts to the amount of 3800*l.* To secure the payment of this sum, the bankrupts, in August 1838, executed a joint and several bond to the petitioners, as such executors; and, as a collateral security, deposited with them a policy of insurance for 2500*l.* on the life of one of the bankrupts effected in the Equitable Assurance Office. This office carried on their business on the principle of mu-

The mere omission to give notice to an insurance office of the assignment by the bankrupt of a policy effected on his life, is not, of itself, sufficient evidence that the bankrupt was the reputed owner of the policy, within the meaning of the 6 Geo. 4, c. 16, s. 72.

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tual assurers, and permitting the parties assured to participate in the profits. Notice of the deposit of the policy was given to the office on the 22d March. The fiat issued on the 1st April 1841, and the act of bankruptcy was alleged in an affidavit of the respondents to have been committed on the 15th March preceding, by an absconding of the bankrupts from their dwelling-house. At the date of the fiat, there was due to the petitioners on the bond the sum of 3782*l*.

The second petition claimed a lien on two other policies effected in the Rock Life Assurance Office and another office; the material facts were the same as in the first petition, except that it did not appear in evidence that these two last-mentioned offices carried on business on the footing of any participation of profits by the insurers.

Mr. *Swanston*, in support of the petition. The only question for the Court to determine is, whether sufficient notice has been given by the petitioners to the insurance office, to take the case out of the operation of the 72d section of the Bankrupt Act, relating to goods and chattels in the order and disposition of the bankrupt at the time of his bankruptcy. Supposing that notice was necessary to be given to the office before the act of bankruptcy, there is another point to be considered, namely, whether there is in this case sufficient evidence of a prior act of bankruptcy. It is true, that one of the respondents swears that the bankrupts absconded from their dwelling-house, and went abroad, on the 15th March. But the question is, did they go abroad with intent to delay their creditors? Now there is no evidence whatever of the bankrupts' intention, except the

deponent's belief of their intention, and the fact that they stopped payment on the same day on which they departed from their dwelling-house. But it is submitted, that, according to the law now in force, the alleged act of bankruptcy will not defeat the title of the depositary of the policy in the Equitable Assurance Office; for, in that office, the parties assured participate in the profits, and must be therefore considered as partners; and it has lately been decided by the Vice Chancellor of England in the case of *Duncan v. Chamberlain*(a), that under these circumstances no formal notice to the office is necessary, as the knowledge of one partner amounts, in construction of law, to the knowledge of all. The same principle has also been acted on in this Court. Moreover, the recent act of parliament of 2 & 3 Vict. c. 29., now substitutes the *date of the fiat* for the act of bankruptcy, as to *all transactions*. [Sir John Cross. How do you make out, that giving notice to the insurance office is a transaction with the bankrupt?] With great submission, I contend that it is a transaction with the bankrupt in more senses than one; the deposit of the policy being a transaction affecting the property of the bankrupt, the notice of such deposit becomes an essential part of the transaction with the owner, whose property is sought to be charged. The insurance office represents the bankrupt, for the purpose of receiving notice. It was the act of the bankrupt to give a lien on the policy of assurance; that was the first act of the transaction; the second act was, to give the necessary notice of the lien; and the insurance company were the

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(a) *Coram* Vice-Chancellor, 4th Dec. 1840. Mr. J. Russell, *amicus curiæ*, stated that this case was not finally decided, but was referred to the Master, who had not yet made his Report.

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bankrupt's agents for that purpose. But, the bankrupt being a partner in the insurance office, any transaction with the office is a transaction with the bankrupt himself.

Mr. *Stinton*, for the assignees. The policy was in the order and disposition of the bankrupt at the time of his bankruptcy, according to the decision of the Vice-Chancellor of England in *Williams v. Thorp (a)*, who held, that, where a bankrupt had assigned a policy of life assurance, but had given no notice to the office, the assignees under his commission were entitled to the benefit of it. [Sir *John Cross*. The criterion appears to me to be, who has the policy? for that is the sign of ownership.] In a subsequent case, also, the Vice-Chancellor again decided, that the operation of the clause of reputed ownership will attach on a policy, which a bankrupt has assigned, without giving notice to the office; *Ex parte Colville (b)*. With respect to the operation of the 2 & 3 Vict. c. 29., I contend that that statute does not apply to the present case.

Mr. *Swanston*, in reply. There is a palpable distinction between the mere assignment of a simple contract debt, and a debt secured by an instrument under hand and seal. Would any person, who had given a bond for the payment of a debt, ever think of paying the debt, without asking for the bond? Such a proceeding would be contrary to all usage. There can be no reputation of ownership, therefore, when the bankrupt has actually assigned the debt, and parted with the possession of the

(a) 2 Sim. 257.

(b) Mont. 110.

only instrument by which the debt is secured. In regard to the application of the 2 & 3 *Vict. c. 29.*, the *transactions* referred to in the act are not confined to those transactions in which the bankrupt is personally present, nor does it require the bankrupt's hand to intervene; but it may be a transaction on behalf of the bankrupt; a transaction with his agent, or by proxy. The act did not mean to interfere with the relation of principal and agent, or of partners; but merely to give to all those acts which bind the bankrupt the same effect as all his transactions before the act of bankruptcy, substituting merely the issuing of the fiat for the act of bankruptcy.

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Ex parte
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Sir JOHN CROSS.—The question is, whether I am bound by the cases that have been cited, to hold, that, for want of a formal notice to the insurance office, the policy was in the order and disposition of the bankrupt. It could only have been in his order and disposition by means of a fraud. The statute that has been referred to appears to me to apply to transactions between two persons, one of whom must be the bankrupt. But I will consider the case on both points.

Cur. adv. vult.

Sir JOHN CROSS now delivered judgment.—This was a petition by the executors of *Sarah Styant*, deceased, praying an Order for selling certain policies of insurance, in payment of a debt due to them as such executors, with liberty to prove for the deficiency. It appeared, that the testatrix had lent a sum of 3800*l.* to the bankrupts, and that the policies in question, one of which was effected in the Equitable Assurance Office, were deposited seven years ago with the testatrix, to secure

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the repayment of that sum. On the part of the assignees it was insisted, that, unless the petitioners could show that notice of the deposit was given to the insurance company before the act of bankruptcy, the policies must be taken to have been in the order and disposition of the bankrupts with the consent of the true owner, and that they were therefore the reputed owners of the property at the time of their bankruptcy. I own, it seems to me a strange conclusion, that, merely from the circumstance of the holder of the policies not having delivered notice of the deposit at the office, they must be taken to have continued in the hands of the bankrupts as reputed owners, without any evidence of reputation of ownership. There was no proof adduced, that any one but the parties themselves knew of the existence of these policies. After the testatrix had continued in possession of the policies for no less a period than seven years, it is rather a strong thing to insist that the bankrupts were the reputed owners, and retained the order and disposition of them at the period of their bankruptcy. It has been urged, that the bankrupts had the power to dispose of these policies, although they might not be in their actual possession; that is, power to commit a fraud; for if they had attempted to assign the policies to another, it could only have been done by a fraud upon the holder of them. I am aware that the opinion I now express is a little at variance with some reported cases; but it has always appeared to me, that the question of reputed ownership is a pure question of fact; and, in the present case, I do not think that the bankrupts were proved to have been the *reputed owners* of the policies. I am of opinion, that the mere omission to prove notice to the insurance office is not alone sufficient to bring the case within the meaning of the 72nd section of the 6 Geo. 4.

c. 16., and to lead to the inevitable conclusion that the bankrupts were reputed owners. There must be an Order therefore for the sale of the policies, with liberty to go before the Commissioners, and prove for any deficiency. As the question now raised is of frequent occurrence, I shall be most willing to allow a special case on appeal from my judgment, with a view to have the matter definitely settled.

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Ex parte
SMITH.

In the matter of THOMAS and WILLIAM STYAN,
WILLIAM PENNELL and others,
appellants;
and WILLIAM HENRY SMITH and others,
respondents.

THIS was an appeal to the Lord Chancellor from the decision of the Court of Review in the last case; and came before his lordship on the following

SPECIAL CASE.

The bankrupts were jointly and severally indebted to the petitioners, as executors of one *Sarah Styán*, in the sum of 3800*l.*; and the bankrupts executed their joint and several bond to the petitioners, dated 20th August 1838, for the payment of the said debt by instalments, with interest as therein mentioned. And, as a collateral security for the payment of the said debt, the bankrupts deposited with the petitioners a certain policy of insurance for 2500*l.* on the life of the bankrupt *Thomas*

Feb. 16 1842.
coram Lord
Lyndhurst, C.

A policy of assurance effected with a company, in which the assured participate in the profits, is deposited to secure a debt; but no notice of the deposit is given at the office, until seven years afterwards, nor until after the depositor had committed an act of bankruptcy; of which however it does not appear that the depositary had notice. A fiat having issued against the debtor:

Held, 1. That the question, whether the bankrupt was reputed owner of the policy at the time of his bankruptcy, was one of law, and properly the subject of a special case.

2. That, under the 2 & 3 *Vict.* c. 29., the notice was sufficient to give the depositary a good title against the assignees.


Quære, whether, under the circumstances, it was requisite for the depositary to show that any express notice had been given.

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Styan ; which had been previously deposited with the petitioner *William Henry Smith* in trust for the said *Sarah Styan*, as a security for the same debt, many years before the date of the said bond, and has continued in his custody ever since as such collateral security. The said policy was effected on the 10th February 1810 with the Equitable Insurance Society, whereby the trustees thereof assured the sum of 2500*l.*, to be paid to the executors, administrators, and assigns of the said *Thomas Styan* after his decease. The said society is in the nature of a joint stock company, and wherein the persons effecting policies of assurance are jointly interested in the profits to be made by the society. There was due and owing to the petitioners at the date of the fiat, and still is due and owing to them, the sum of 3782*l.* upon the said bond. The petition to the Court of Review, after stating these facts, prayed (among other things) in the usual form, that the policy might be sold, and the proceeds applied in satisfaction of the said debt. The petition did not allege, nor was any proof tendered of a notice to the assurers of the pledge and the deposit, before the bankruptcy of *Thomas Styan* ; but it appeared, that he had committed an act of bankruptcy on the 15th of March ; that such notice was given to the assurers on the 22nd of March ; and that the fiat bore date on the 1st of April following. The petition came on to be heard on the 30th of July last, before his Honor Sir *John Cross*, the acting judge of the said Court ; when the learned counsel for the assignees, without disputing any of the facts alleged in the petition, claimed for their clients the right of property in the said policy, free from the lien of the petitioners, by force of the statute 6 *Geo. 4. c. 16. s. 72.*, as being at the time of the bankruptcy of *Thomas*

Styan, with the consent of the petitioners, in the possession, order, or disposition of the bankrupt, and whereof he was then the reputed owner. No evidence was offered in support of this claim; but the counsel for the assignees relied on the absence of any allegation or proof, that the assurers had notice of the said deposit and pledge prior to the bankruptcy; which they insisted was, by law, conclusive evidence of the right claimed for the assignees. Nevertheless the learned judge decided, that this was not, by law, conclusive evidence of such right; and that there was no sufficient evidence before the Court, to prove that the policy was at the time of the said bankruptcy, with the consent of the petitioners, in the possession, order, or disposition of the bankrupt, and that he was then the reputed owner thereof, within the intent and meaning of the statute; and thereupon the learned judge declared that the petitioners were equitable mortgagees of the said policy of insurance, and ordered and decreed that the same should be sold and applied in the manner prayed by the petition.

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Mr. *Richards*, and Mr. *Stinton*, for the appellants. It is settled by a long series of cases, that notice to the debtor is essential to the completion of the mortgage of a debt. The principle upon which this doctrine was originally founded was, that, as incorporeal things did not admit of delivery, the mortgagee was bound to do everything, which was consistent with the nature of the property, to denote the alteration in the ownership of it. This was the ground of the decision in *Ryall v. Rolle*(a), the leading case on the subject; where Lord Chief Baron *Parker*, (who, together with the Lord Chief

(a) 1 Atk. 165.

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Justice of the Court of King's Bench and Mr. Justice *Burnet*, assisted Lord *Hardwicke* upon that occasion), said, "If a bond is assigned, the bond must be delivered, and notice must be given to the debtor; but, upon an assignment of book debts, notice alone is sufficient; because there can be no delivery, and such acts are equal to a delivery of goods which are capable of delivery. *Domat* says (a), things incorporeal, such as debts, cannot properly be delivered. This is to show the nature of assignment of debt by notice to the debtor. This clause, therefore, extends to things in action, and all has not been done that might have been done by the assignee to vest the right of them in himself, and to take away from the bankrupt the power and disposition of them; for no notice has been given to the debtors." This case was decided in 1749. In 1804, Sir *William Grant* said in *Jones v. Gibbons* (b), "It is decided by *Ryall v. Rolle*, that debts and chattels are within the meaning of the statute; the consequence is, that, if they remain in the possession, order, and disposition of the bankrupt at the time of the bankruptcy, they will pass by the assignment to the assignees; therefore, in order completely to divest the bankrupt of such debts, he must have done everything that is equivalent to a delivery of chattels personal, that is, of moveable goods; and the judges, at least one of them, Sir *Thomas Parker*, says 'That which is equivalent to delivery of moveables is, in the case of a debt, an assignment and delivery of the security (if any), and notice to the debtor of the assignment.' It might perhaps have been a question, whether, after assignment and delivery of the security to the assignee, the bankrupt could be said to have the order and disposition,

(a) *L. 1, t. 2, s. 2*, par. 9.(b) 9 *Ves.* 410.

merely because there was no notice to the debtor of the assignment; probably that requisite was added, as otherwise the debtor might safely pay the money to the person who had without his knowledge ceased to be his creditor." As early as this period, therefore, Sir *W. Grant* adverts to the doctrine, upon which the Court of Review has proceeded in its decision upon the present case; but treats the point as being then set at rest by the case of *Ryall v. Rolle*.—The next case was that of *Ex parte Monroe (a)*, which was decided in 1818 by Sir *Thomas Plumer*, V. C., and was the case of a bond debt; and there, although the bond had been delivered to the assignee, the Vice Chancellor decided that the debt remained in the order and disposition of the bankrupt, because no notice had been given to the debtor; saying, "I find the practice of the commissioners has been conformable to the rule stated in *Ryall v. Rolle*; the absence of any decision to the contrary since the time of Lord *Hardwicke* shows that rule to have been acquiesced in, and I think rightly; for the obligee, where notice is not given, may obtain payment of the debt; which is sufficient to leave it in his order and disposition within the meaning of the statute."—The next authority is that of *Ex parte Burton (b)*, in which the general principle was admitted on all hands, and the only question was, whether the circumstance of the debt being assigned by a partner retiring from trade to the continuing partner, who consequently had a right of ownership independently of the assignment, exempted the case from the application of the rule. The Vice Chancellor, however, decided that it did not; because, although the assignee was, independently of the assignment, competent to re-

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(a) Buck, 300.

(b) 1 G. & J. 207.

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ceive the debt, yet, until notice was given to the debtors, the retiring partner was equally competent to give a discharge; and the debt was consequently in the reputed ownership of the firm.--The next case, which is that of *Ex parte Usborne* (a), was decided in 1823 by the same judge, and is to the same effect as the authority last cited. These were all cases of debts.--The next case, in point of date, is that of *Williams v. Thorpe* (b), in 1828, where the assignment was that of a policy of assurance, in the same office as that in which the policy now in question was effected; and it was attempted there to distinguish the sum secured by a policy from an ordinary debt, on the ground that the office would not have paid the sum insured, without a production of the policy; but the Vice Chancellor considered the question as concluded by the authorities already cited. This decision was followed by that of *Ex parte Colvill* (c), which was decided by the same judge, and is to the same effect.--In the interval, however, between the two last mentioned decisions, the principle had been fully argued and settled, upon appeal before your lordship, in the cases of *Dearle v. Hall* (d), and *Loveridge v. Cooper* (d), which were followed in the case of *Cooper v. Fynmore* (e). [Lord Chancellor. Those cases were decided upon the authority of *Ryall v. Rolle*, the principle of which appears to me free from doubt.] It has been since acted upon by your lordship, when Chief Baron, in the case of *Smith v. Smith* (f); and still more recently by the present Master of the Rolls, in the

(a) 1 G. & J. 358.

(c) Mont. 110.


(e) 3 Russ. 60.

(b) 2 Sim. 257.

(d) 3 Russ. 1.

(f) 2 Crompt. & Mees. 232.

case of *Timson v. Ramsbottom* (a); where it was decided that although one of two executors, in whose names the fund which was the subject of the incumbrances in question was standing, had notice of the first incumbrance, he being himself in fact the first incumbrancer, yet that such notice was not sufficient to prevent the second incumbrancer, who gave notice to the other trustees, from having priority. And this case has been followed in that of *Meux v. Bell* (b) before *Vice Chancellor Wigram*. It is indeed unnecessary to discuss the general principle; since the actual case of an assignment of a policy was decided by *Lord Chancellor Brougham*, in *Ex parte Tenyson* (c), which was an appeal from the decision of the Vice Chancellor in *Ex parte Colvill* (d), already referred to, and where all the law and authorities upon the subject were fully gone into, and discussed both in the argument and the judgment. The respondents have therefore thrown upon them, the burden of proving that their security was completed by such notice having been given. And the argument that was addressed to the Court of Review, to the effect that the assured are partners in the Equitable Assurance Company, and that therefore if one of them assign his policy, the notice, or rather knowledge, which he has of the transaction is notice to the company, is met by the observation that if it were correct, the decision in *Williams v. Thorpe* (e) must be overruled; for the policy there was effected in the same office, as the policy in the present case.

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(a) 2 Keen, 41.

(b) 1 Hare, 73; see also *Forster v. Blackstone*, 1 M. & K. 297; *Forster v. Cockerell*, 3 Cl. & Fin. 456; 9 Bli. N. S. 232, S. C.; and what is said by *Lord Cottenham, C.* in *Gardner v. Lachlan*, 4 My. & Cr. 132.

(c) Mont. & Bli. 67.

(d) Mont. 110.

(e) 2 Sim. 257.

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Mr. *Swanston*, and Mr. *Bacon*, for the respondents. This is not a proper question for a special case, being one of fact merely, upon which there can be no appeal. The burden of proving the reputation of ownership lay upon the appellants; and the Court of Review thought the evidence produced by them insufficient to establish such reputation. The special case expressly states the Court of Review to have decided, that there was no sufficient evidence that the policy was at the time of the bankruptcy, with the consent of the petitioners, in the possession, order, or disposition of the bankrupt, or that he was the reputed owner thereof. Questions of reputed ownership are in Courts of law left to the jury, whose verdict would not be disturbed, except on the ground of its being contrary to evidence. The point would never be reserved for the opinion of the Court. [*Lord Chancellor*. The question is, whether the bankrupt could transfer the property in the policy, by a mere transfer of the instrument, without notice to the office. The appellants say, the possession of the respondents was not complete, without notice,—and that, until such notice was given, the bankrupt cannot be considered as having parted with the possession. That is really quite a question of law.] We say, the mere circumstance of possession is immaterial, if there were not besides a reputation of ownership; now, whether there was such reputation or not, must be a question of fact. And, therefore, even if the appellants succeeded in convincing the Court that some technical kind of possession remained in the bankrupt, the question must nevertheless be decided against them; it being found,—and according to 1 & 2 Will. 4. c. 56. s. 3., conclusively,—by the Court of Review, that there was no evidence of reputation. Under these cir-

cumstances, it is unnecessary to discuss the question, as to what, technically speaking, shall be considered possession of a description of property, which is, in fact, incapable of possession. But it may be observed, that the authority of *Ryall v. Rolle*, which has been so much relied upon, consists of a mere *dictum* of Lord Chief Baron *Parker*; and the reasoning upon which the dictum is founded is by no means conclusive,—delivery of possession not being essential to pass property in goods which are capable of delivery, where a good consideration is paid for them. The only cases which have been cited, where the property in dispute was a policy of assurance, are *Williams v. Thorp* (a) and *Ex parte Tennyson* (b); which, however, are at variance with the cases of *Falkner v. Case* (c), decided by Lord *Thurlow*, and *Bozon v. Bolland* (d), decided by Sir *J. Leach*. In *Falkner v. Case*, the property in question was the sum secured by a policy on a ship. The policy had been assigned by a person, who afterwards became bankrupt, to a creditor to secure a debt; but the broker by whom the policy was effected, and who had by an arrangement with the bankrupt a lien upon it, kept it in his possession as a security. It did not appear that any notice had been given of the assignment, either to the broker, or the underwriters; and after the bankruptcy the broker was applied to, both by the assignees and the creditor, to deliver up the policy; and, upon the former offering to discharge the broker's demand, and the latter declining to do so, the policy was handed over to the assignees, who received the insurance money. The executor of the creditor then filed a bill in Chan-

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(a) 2 Sim. 257.

(b) Mont. & Bli. 67.

(c) 2 T. R. 491.

(d) Mont. & Bli. 74.

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cery against the assignees to recover the proceeds, and the Lord Chancellor held that he was entitled to them; and, with reference to the objection that possession of the policy had not been delivered, the Lord Chancellor said, that as the bankrupt had not the possession to deliver, having barely the right to redemption, he had done all that he could do in assigning all his equitable right to the plaintiff; that the statute was to be considered as a *jus positivum*, and that it was impossible to charge the assignee of this equity with having left the possession of the thing assigned in the hands of the bankrupt. And then,—in reference to the argument that the creditor should have given notice to the broker of his equitable interest, for the purpose of publishing to the world that the property did not belong to the bankrupt,—the Lord Chancellor said, the answer to that was, that there was not a *scintilla* of property in the bankrupt; and secondly, supposing notice had been given, it would have been a transaction merely between the creditor and the broker. But it was not suggested, either in the argument or the judgment, that notice to the underwriters was necessary. However, in the present case, the insurance company had sufficient notice of the mortgage, if any notice were necessary; for the rule is, that notice to a partner is notice to the firm; and there is nothing to exempt from the operation of this rule a society, like the Equitable Assurance Company, in which all the assured participate in the profit, and are consequently partners. This point was so decided in the case of *Ex parte Waithman* (a), where, it is true, the bankrupt was a director of the company; but the decision did not turn upon that circumstance; and it was never contended that there

(a) 2 M. & A. 364; 4 Deac. & C. 412.

was any difference in this respect between a dormant and an acting partner. The point was not adverted to in the case of *Williams v. Thorp* (a), as appears from what fell from the judge (who decided that case) in the recent case of *Duncan v. Chamberlain* (b), which is an express authority for the respondents; for there, it having been found by the Master, that by the constitution of the Equitable Society the assurers are partners with the assured, the Vice-Chancellor said, "This point was not taken in *Williams v. Thorpe*, nor does it seem to have been taken when this case was first before the Court. It appears to me that the effect of all persons insuring being thereby partners in the society, is to make the fact of the assignment of the policy by the assured a fact which the other partners must be taken to have known."—There is one more point, on which the respondents might, if necessary, rest their case. The fiat did not issue till the 1st of April, whereas formal notice of the deposit was given to the office on the 22d of March. Now, although the act of bankruptcy is alleged to have been committed on the 15th of March, yet it is not pretended that the respondents had notice of it; and, consequently, the transaction is protected by the statute 2 & 3 Vict. c. 29, s. 2, which provides that all contracts, dealings, and transactions, by and with any bankrupt, really and *bonâ fide* made and entered into by him before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person or persons so dealing with the bankrupt had not, at the time of such contract or deal-

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(a) 2 Sim. 257.

(b) April 30th 1841, Law Journal, vol. xix. (Cases in Chancery), p. 309.

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ing, notice of any prior act of bankruptcy by him committed. [*Lord Chancellor*. The long interval of seven years, which elapsed between the deposit and the notice, is a suspicious circumstance. What induced the respondents to select the precise period which they chose for giving notice ?] There is no proof, or even suggestion, of the respondents having had notice of the act of bankruptcy ; and the burden of proving such notice lies on the appellants. It was said in the Court of Review, that giving notice to the office was not a transaction by or with the bankrupt, and so not within the act ; but the answer to that observation is, that the notice and deposit are parts of one transaction between the bankrupt and the mortgagee. For all these reasons, namely, 1st. That the question is one of fact,—2dly. That there is no rule rendering notice of an assignment of a policy indispensable,—3dly. That the notice which the bankrupt had of the assignment was sufficient, he being a partner in the company,—and 4thly. That the transaction is protected by the 2 & 3 *Vict. c. 29. s. 2*,—this appeal must be dismissed.

Mr. *Richards*, in reply. The first two of these points have been disposed of by the observations of the Court, and the authorities cited ; and with regard to the third, the respondents' argument rests entirely on the case of *Duncan v. Chamberlaine* ; but the doctrine, which the judgment in that case (as now read to the Court) professes to establish, is of too great importance to be conclusively settled by a case, which does not appear to have been much considered. [*Lord Chancellor*. The Vice-Chancellor must have considered the question, when he directed the reference to the master, as to the fact of partnership.] It cannot be

argued, that there was notice here for any practical purpose. [*Lord Chancellor*. It is not, I suppose, contended that the transaction amounts practically to a notice; in *Ex parte Waithman*(a) it did.] The necessity of notice arises from a rule of equity, which must be complied with really and substantially, and cannot be satisfied by notice, which is merely technical and constructive. As to the remaining point, with respect to the statute 2 & 3 Vict. c. 29. s. 1., it is only necessary to refer to the words of the clause, to see that they do not apply to the present case. The notice here was given after the act of bankruptcy; and, as it is a dealing between the creditor and the insurance company, and not a contract, dealing, or transaction, by or with the bankrupt, the case is unaffected by the provisions of the statute, and the property must be held to have passed to the assignees by the old law. And, with reference to the argument that the notice and deposit constitute one transaction,—the answer to that is, that, however requisite notice may be, as regards third parties, the transaction is complete without it, as regards the bankrupt and the party dealing with him, who are the only persons within the purview of the statute.

*Cur. ad. vult.*

LORD CHANCELLOR.—The bankrupts in this case executed their bond in August 1838 to the petitioners, as executors of *Sarah Styan*, in a sum of 3800*l.*, in respect of a debt due from them to her estate; and, as a collateral security for the payment of the debt, deposited with them a policy of insurance for 2500*l.* on the life of one of the bankrupts. At the date of the fiat, there was due to the petitioners as executors the sum of 3782*l.*, on ac-

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(a) 2 M. & A. 364; 4 Deac. & C. 412.



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count of the bond. *Thomas Styán* committed an act of bankruptcy on the 15th of March last ; and, on the 22d of the same month, notice was given to the assurers of the pledge and deposit of the said policy. The fiat was issued on the 1st April. It was contended on the part of the assignees, that the policy passed by the assignment to them, inasmuch as no notice was given to the assurers of the deposit, before the act of bankruptcy. On the other hand, it was contended on the part of the executors, first, that no notice was in this case necessary ; and secondly, that, even supposing a notice was required, the assured was a partner in the insurance company, which was in the nature of a joint stock company, and that notice to him, or rather his knowledge, of the deposit which he had himself made, was in point of law notice to the assurers. It was further contended for the petitioners, that they were entitled to retain the said policy, by virtue of the statute of 2 & 3 *Vict. c. 29*. It is unnecessary to give any opinion, with respect to the two first questions to which I have adverted, or to comment on the authorities which have been cited ; because it appears to me, that the case falls distinctly within the provisions of the act to which I have referred. By that statute it is enacted, “ that all contracts, dealings, and transactions by and with any bankrupt, really and *bonâ fide* entered into before the date and issuing of the fiat against him, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed ; provided the person or persons so dealing with such bankrupt had not, at the time of such contract, dealing, or transaction, notice of any prior act of bankruptcy by him committed.” All *bonâ fide* dealings and transactions, therefore, with the bankrupt before the fiat,

and without notice of the act of bankruptcy, are valid. In this case, the *transaction*, or *dealing*, consisted of the deposit or pledge of the policy, and the notice to the assurers; which latter step, it is contended, was necessary to render the transaction binding against all other claimants. The whole of this was completed before the date of the fiat; and it is not alleged, that the transaction was not in every part of it *bonâ fide*, or that the parties had any notice of the act of bankruptcy. It appears to me, therefore, that the case falls distinctly within the statute, and that the transaction is protected by it. Supposing the pledge to have been made *bonâ fide*, and without notice of the act of bankruptcy, immediately after that act, and to have been followed by a notice given also before the fiat,—could it be doubted, that such a transaction would fall within the provisions of the statute? And what difference can it make in this respect, that the deposit was, as in the present instance, made long before the act of bankruptcy, and the transaction completed by a notice given after such act, but before the date of the fiat? It is sufficient, that the whole transaction was *bonâ fide*, and without notice of the act of bankruptcy; and that every part of it took place before the date of the fiat. I am of opinion, therefore, that the Order of the Court of Review must be affirmed.

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*Serjeants' Inn  
Hall,  
July 14.*

Where the bankrupt deposited title deeds with his bankers, to secure future advances, and, after a change in the partnership, continued for six years the same mode of dealing with them, and the same running account; *Held*, that this was a tacit recognition of the deposit of the deeds with the new firm upon the same terms as with the old.

Ex parte HENRY JAMES OAKES, ROBERT BEAVAN, GEORGE MOOR, and WILLIAM ROBERT BEVAN.—In the matter of ROBERT WORTERS.—

THIS was the petition of equitable mortgagees for the common Order, and for leave to bid.

The petitioners were bankers at Sudbury; and it appeared that on the 18th May 1830, which was before *William Robert Bevan* was a partner in the banking house, the bankrupt obtained from the then banking firm an advance of 1000*l.*, on the security of the deposit of the title deeds of certain copyhold property in the County of Suffolk, which it was agreed should be a security not only for the repayment of the 1000*l.*, but also of any other sums of money which might be afterwards advanced by the firm. On the 12th August 1836 *David Hanbury*, one of the then partners in the bank, died; and on the 1st November 1836 *William Robert Bevan* was admitted a partner in his room. The fiat issued against the bankrupt on the 23rd February last, when a balance was due from him of 1075*l.* 12*s.* for advances made to him by the bank. The petitioners alleged, that in or about the month of January last, the bankrupt acknowledged that he was indebted to the petitioners collectively for the amount of any balance due, and that they retained a lien upon the title deeds for all such advances as had been made either by the old firm or the new one. There was also an express subsequent recognition of the petitioners' lien made by the bankrupt on the 13th February last; the act of bankruptcy having been committed on the 10th February.

Mr. *Swanston* appeared in support of the petition.

Mr. *Stinton*, *contrà*. There should have been either some express recognition made by the bankrupt to the new firm of the former deposit, on the admission of a new partner; or else, there should have been a fresh deposit of the title deeds with the new firm. In *Ex parte Marsh* (a), where the security of a deposit was held to be continued, after an alteration in the members of a banking firm, it was on the ground of an express subsequent recognition in writing, raising an agreement to that effect. And in *Ex parte Kensington* (b), where an equitable mortgage by deposit of deeds was extended to advances after the alteration of the firm, Lord *Eldon* said, that "understanding alone, unless in a fair sense amounting to agreement, would not do;" but his Lordship in that case added: "My opinion, however, is, that if, upon the affidavit and examination taken together, aided by the extreme probability of their intention, I can collect, that what was originally deposited for one purpose should be held as deposit also for the other, with reference to the demand of the subsequent partners, *that*, though by parol, would be sufficient." In *Ex parte Lloyd* (c), there was an express verbal agreement between the parties, after a change in the firm of the petitioners, that the deeds previously deposited should still remain in their hands, subject to the like claim as had been previously agreed upon. Now, in the present case, there was no express recognition by the bankrupt of the previous deposit, until after the act of bankruptcy; for the acknowledgment, that is stated to have been made by the bankrupt "in or about the month of January," is not sufficiently precise, to give a lien to the petitioners on the title deeds.

1841.

Ex parte  
Oakes  
and others.

(a) 2 Rose, 239.

(b) 2 Ves. &amp; B. 79—83; 2 Rose, 138.

(c) 1 G. &amp; J. 389.

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Ex parte  
OAKES  
and others.

Mr. *Swanston*, in reply, was stopped by the Court.

Sir JOHN CROSS.—It seems to me, that the fact of the deposit of the title deeds with the former firm to secure future advances, coupled with the fact of the bankrupt suffering the deeds to remain with the bankers after the change in the firm, and also continuing for six years the same identical account and dealing with the new firm as he had done with the old, affords quite sufficient evidence of an agreement on the part of the bankrupt to continue the deposit of the title deeds upon the original terms. I see no evidence whatever that the former debt due to the old firm is in existence; I must therefore take it for granted that the balance now claimed is a debt due to the new firm. The question is, whether there must be an express, or whether there may not be a tacit, recognition of the previous deposit. Now it appears to me, that a man may recognize by his acts, as well as by his words; and if that is so, that there has been a continued recognition by the bankrupt for the last six years, evidenced by a running account with the bankers during that period, and a continuation of dealing with them upon the same terms as with the former firm. There has been no change in the account, although there has been a change in the partnership; and the deeds are permitted by the bankrupt to continue in the custody of the new firm. For what purpose? Why to get further credit for future advances. All these facts taken together seem to me to be stronger evidence of a recognition of the deposit, than mere words would have been. The petitioners are therefore entitled to the relief they seek.

Common ORDER.



1841.



*Serjeants' Inn  
Hall,  
July 9.*

Ex parte MILLER.—In the matter of GEORGE POCKOCK  
IRVING.—

THIS was a petition of creditors to annul a fiat, which had been directed to a Commissioner of the Court of Bankruptcy in London, and for an Order that a new fiat might issue directed to Commissioners at Stockton.

The bankrupt had resided and carried on business at Stockton until February last, when he sold all his effects, and afterwards resided at various places, but finally came to London. The number of the *Stockton* creditors was seven, and their debts amounted to 433*l.*; the London creditors were five in number, and their debts amounted only to 202*l.* The largest creditor, whose debt was 1400*l.*, lived at Bristol; the petitioning creditor was a farmer at Stroud in Gloucestershire, and he stated in his affidavit, that the bankrupt was indebted to him in 100*l.*, on a promissory note nearly two years old, but did not state the consideration for which the note was given. It appeared, that shortly before the fiat issued the bankrupt had given in a list of his debts, with a view to a compromise with his creditors, but that this debt of the petitioning creditor was not included in such list. On the 26th May last, an application was made to this Court for a special Order that the fiat might be issued to a London Commissioner, instead of being directed to Stockton, on the ground that the bankrupt had sold off all his effects at that place and had come to live in London; that the witnesses to prove the requisites also lived in London, as well as a large proportion of the creditors; and that the fiat would be more conveniently worked in London. The Order was accordingly made for a London fiat, in

Where an Order for a London fiat had been obtained at the instance of the petitioning creditor, instead of one directed to the place where the bankrupt had carried on his business, and where the greater number of his creditors resided; and it afterwards appeared to the Court, that there was reason to suspect that the venue had been changed to serve some secret purpose of the bankrupt, and that the petitioning creditor was colluding with the bankrupt to accomplish this object; the London fiat was annulled, and a country fiat directed to issue.

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which the bankrupt was described as “late of Stockton in the county of Durham, but now of Rotherhithe in the county of Surry, shipbuilder.” But it appeared, that he had never himself carried on business at Rotherhithe, but was merely an apprentice there to one *Hawkins*, a shipbuilder.

Mr. *Spence*, and Mr. *Sturgeon*, in support of the petition.

Mr. *Swanston*, Mr. *Anderdon*. and Mr. *Stammers*, for the petitioning creditor. The settled practice in bankruptcy under the former jurisdiction was, that where the matter was merely in docket, and before a commission issued, the Court would ascertain, whether it would be more convenient to execute the commission in one place, or another. But when a commission had once issued, the Lord Chancellor would never entertain the question, whether it would be more convenient, or not, to execute the commission at a particular place. The only ground for such an application as this, after the Court has made an Order for a London fiat, is, that a fraud has been practised upon the Court in obtaining that Order. Now, that this is a case of confessed bankruptcy, there can be no doubt; for none of the requisites are disputed. Neither is it denied, that the bankrupt had for some time before the issuing of the fiat lived in London, and that the witnesses to prove the requisites also resided there, that the largest creditor resided at Bristol, and the petitioning creditor at Stroud. Not one of these facts has been controverted by the present petitioner. It was never stated, when the former Order was applied for, that the majority of the creditors resided in

London, but merely a considerable proportion of them. The Court has always been accustomed to make an Order for directing the fiat to that place, where a considerable number of the creditors, and the witnesses to prove the requisites, resided; *Ex parte James (a)*, *Re Storey (b)*, *Ex parte Lycott (c)*.

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~  
*Ex parte*  
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Mr. *Rolt*, for the bankrupt, asked for the costs of his appearance, as he had been served with the petition.

Mr. *Spence*, in reply, was stopped by the Court.

Sir JOHN CROSS.—This petition is one of no ordinary kind; praying, as it does, to rescind an Order, which the Court was induced to make for changing the venue of this fiat to a considerable distance—no less than 250 miles from the place where the bankrupt carried on his business, and where the great bulk of his creditors reside. That Order would certainly not have been made, if the Court had not been ignorant of the real facts of the case. When the former application was made, the impression on my mind was, that the circumstance of the bankrupt having sold off all his effects at Stockton rendered it probable that he was about to abscond from this country, and that the most effectual mode to recover any property for the creditors was to issue the fiat to London, where the bankrupt was then to be found, as a *festinum remedium*. After the bankrupt went away from Stockton, the next that we hear of him is his being seen in London in company with the petitioning creditor, who is a farmer at Stroud. What brought them together so far from

(a) Mont. &amp; C. 349; 4 Deac. 91.

(b) Mont. &amp; C. 362.

(c) Id. 642; 4 Deac. 272.



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their respective places of residence does not appear. Now, although the law permits the petitioning creditor and the bankrupt to collude in suing out a fiat, it does not allow them to collude in the commission of the act of bankruptcy. Let us look at the evidence in this case. It is charged against the petitioning creditor, that the fiat was sued out by him to serve the purposes of the bankrupt, and this is nowhere denied by the petitioning creditor. It has been stated, that the bankrupt left Stockton for the purpose of coming to reside in London; but there is no evidence that he did actually reside there. I wished to retain the fiat in London, if I could do so with any propriety, and for that purpose I looked at the proceedings, where I find the witness to prove the act of bankruptcy states, that the bankrupt left Stockton in February last, and never returned, but resided since at various other places; and that shortly before his departure he directed the witness to deny him to all persons who called, the bankrupt being then deeply involved in debt; and that the witness accordingly denied him to every person that called, although he was at home at the time. Then I find there is an interlineation in the deposition to this effect, namely, that the solicitor who issued the fiat was one of the persons who called; but who the party was that denied the bankrupt, what relation he bore to the bankrupt, or what right he had to deny him, is not stated. Again, as to the petitioning creditor's debt, the deposition states that the bankrupt was indebted to the petitioning creditor in just the sum of 100*l.*, on a promissory note purporting to be given two years ago. Now, it is rather remarkable, that when the bankrupt made out a list of his debts with a view to a composition with his creditors, this note of two years

standing was not included in the list. However, the whole case was open to the petitioning creditor to prove that he had a *bonâ fide* debt; he comes all the way from Stroud, for the purpose of being examined by the Commissioner on the subject, and might then have stated the particulars of the consideration which he gave for the note; he does no such thing; nor does he even now think proper to state them, although challenged to do so. He has therefore not satisfied my mind that the debt was in existence, when he was endeavouring to enter into a composition with his creditors. Under all these circumstances, I am of opinion that the issuing of the fiat to London, instead of Stockton, was to serve some secret object of the bankrupt; and that the safest course for the Court to pursue will be, to annul this fiat at the costs of the petitioning creditor. With respect to the bankrupt, I cannot award him to pay costs, nor can I order him to have any; for I do not know the fund from which they are to come.

Fiat annulled, with costs.

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Ex parte  
MILLER.

Ex parte CHARLES EDWARDS.—In the matter of

JOHN LATHAM.

THIS was the petition of the public officer of the Halifax and Huddersfield Union Banking Company, praying that the fiat might be annulled, on the ground of there being no good petitioning creditor's debt.

It appeared, that the petitioning creditors, Messrs. R. & came due, that he was responsible for the payment of the bill, was held not to constitute a good petitioning creditor's debt, so as to enable the holder to sustain a fiat against the bankrupt.

Serjeants' Inn  
Hall,  
July 12.

Where a party accepted a bill in the bankrupt's name, without his authority, an acknowledgment by the bankrupt to the holder of the bill, after it be-

not to constitute

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*W. Blackwall* had considerable dealings with *William Latham*, the bankrupt's brother, who was a draper at Halifax; and that on the 1st August last *William Latham* was indebted to them in the sum of 1000*l.* and upwards, for goods sold and delivered. Messrs. *Blackwall* having applied to *William Latham* for payment of this sum, he told *R. Blackwall* that it was not convenient to him to pay then, but that his brother *John*, the above named bankrupt, who he stated was a farmer in good circumstances and entitled to property in right of his wife, would give security for the amount. *R. Blackwall* having acceded to this proposal, *William Latham* delivered to him three several bills of exchange, amounting together to 1012*l.* 2*s.* drawn by *William Latham* upon, and purporting to be accepted by the bankrupt, and indorsed by *William Latham* to Messrs. *Blackwall*. All these bills were duly presented for payment when due, but were returned dishonored. Messrs. *Blackwall* stated, that when they received the bills from *William Latham*, they fully believed them to be the genuine acceptances of the bankrupt *John Latham*. When the first of the bills became due, Messrs. *Blackwall*, at the request of *William Latham*, agreed to renew it, and on the 11th November last *William Latham* delivered to them a new bill in its stead, purporting to be accepted by *John Latham* for the sum of 417*l.* 6*s.*, and payable two months after date; Messrs. *Blackwall* supposing this renewed bill to be also the genuine acceptance of the bankrupt. This last mentioned bill was also dishonored, when due. Messrs. *Blackwall* stated, that, having heard on the 18th January that *William Latham* was in custody in London on a charge of forgery, they became uneasy as to the genuineness of the above acceptances, and on the

same day wrote to the bankrupt to request the payment of an acceptance for 300*l.* then over due, and the renewed acceptance for 417*l.* 6*s.* then just dishonored. Having received no answer to this application, Messrs. *Blackwall*, on the 25th January, sent a clerk to the bankrupt's residence to see him personally, when he admitted that the acceptances of the three bills were not his handwriting, but that he was aware of their having been given by his brother *William*, who had full authority to sign his name to the acceptances ; and that he, *John Latham*, was liable and would pay the amount ; and he at the same time signed and delivered the following memorandum :—" I hereby acknowledge myself responsible for certain bills of exchange drawn by my brother *W. Latham* upon me, and bearing or purporting to bear my acceptance, and paid by him to *W. & R. Blackwall*, and also engage to provide for and pay them, in case my brother should fail so to do.—As witness my hand this 25th January 1841.—*John Latham*." The debt sworn to be due to Messrs. *Blackwall* as petitioning creditors, on the opening of the fiat, was upon the bill for 300*l.*, payable at four months after date ; and, at the meeting for the choice of assignees, they tendered the whole of the bills for proof ; but the bankrupt then denied the validity of the bills, and the authority of *William Latham* to use his name. Under these circumstances, the commissioners postponed the proof, and the choice of assignees, at the request of the petitioners, until they had taken the opinion of this Court on the validity of the debt.

It appeared from the affidavit of the clerk of the petitioning creditors, that when he shewed the bankrupt the two dishonored bills on the 25th January, and named to him the one which was then running and in circulation,

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the bankrupt at once and without the least hesitation, said, that he knew that Messrs. *Blackwall* held the bills, and that they were all right, and were accepted by *William Latham* in the name of him, *John Latham*, by his consent and authority, and that he, *John Latham*, was liable to pay the bills; that *John Latham* thereupon, at the request of the clerk, signed the above memorandum, which was prepared by the clerk; that the statement of *John Latham* was perfectly free and voluntary, without any threat or intimidation or inducement of any kind whatever being used by the clerk; and that *John Latham* at the same interview stated, that his brother *William Latham* had authority from him to use his name to other parties besides Messrs. *Blackwall*, and had frequently so used it. In addition to this affidavit, the bankrupt's sister stated, that the bankrupt *John Latham*, had on some occasions for some years past authorized and permitted *William Latham* to accept bills of exchange in the name of him, the said *John Latham*, and to use and sign his name for that purpose; and that on the 19th January *John Latham* stated to the deponent, that *William Latham* had his authority for signing his name to the acceptances in favour of Messrs. *Blackwall*, and that he would acknowledge the same when at maturity.

Mr. *Anderdon*, and Mr. *Rogers*, in support of the petition. Notwithstanding the statement in the affidavit made on behalf of the petitioning creditors, we submit, that the bill of exchange for 300*l.*, on which the petitioning creditor's debt is founded, is clearly a forgery. After the bill became due and was dishonored, then, and not till then, was any authority given by the bankrupt to *William Latham* to accept bills in his name; and the

acknowledgment then given by the bankrupt of his own liability to pay these bills was merely made by him, with a view to skreen his brother from the charge of forging them. It appears, that the memorandum which contained this acknowledgment was prepared by the clerk of the petitioning creditors, and was signed by the bankrupt at the request of the clerk. We submit, that this acknowledgment is not binding on the bankrupt, for several reasons; first, because it is an undertaking to pay the debt of another, without any consideration being stated in the agreement, according to the requisition of the Statute of Frauds; secondly, because no subsequent recognition can give validity to a forged instrument; and thirdly, because the acknowledgment itself amounts to nothing more nor less than the compounding of a felony.

With respect to the first point, the case of *James v. Williams* (a), which is the last on this subject, is decisive. It was there held, that in an agreement in writing to pay the debt of another, the consideration must be either stated in express words, or be implied with certainty from the terms used. A letter, therefore, from the defendant to the plaintiff in the following words: "As you have a claim on my brother for 5*l.* 17*s.* for boots and shoes, I hereby undertake to pay you the amount within six weeks from this day," was held not to satisfy the Statute of Frauds. Now, there is no consideration whatever stated in the acknowledgment given by the bankrupt; it is merely an admission of his responsibility for certain bills drawn by his brother, and an engagement to provide for and pay them, in case his brother should fail to do so. It does not amount to an absolute recognition of his liability as acceptor, but only an agreement to become surety for his brother.

(a) 5 B. & Ad. 1109.

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But, even taking the acknowledgment to be an absolute recognition of the bankrupt's liability as acceptor of the bills, then we contend, secondly, that no subsequent recognition by him of such liability can give validity to an instrument, which was in its concoction a forgery. This principle is plainly deducible from the decision of the Court of Exchequer in *Esdaile v. La Nauze* (a); where a bill had been obtained and indorsed by an agent, in the name of his principal, for fraudulent purposes; and the Court not only held, that no title was conferred by such indorsement even to a *bonâ fide* transferee, and that the bill must be delivered up to be cancelled, but that a second indorsement, obtained by the holder from the principal after the bill was due, gave the holder no title. So, in the present case, the acknowledgment of the bankrupt, being given after the bill became due, could give no validity to an instrument, which was invalid in its inception and continued so until it arrived at maturity.

Thirdly, the whole transaction between the bankrupt and the petitioner was nothing less than compounding a felony. It is quite clear, even from the statements in the affidavits made on behalf of the petitioning creditors, that the acknowledgment was given by the bankrupt, to induce Messrs. *Blackwall* to forbear a prosecution for forgery against his brother. And, in addition to this unavoidable inference from the petitioning creditor's own statement of the facts of the case, *John Latham*, the bankrupt, refuses to make any affidavit; from which refusal only one conclusion can be drawn, namely, that any true statement of the facts would endanger the safety of his brother. The petitioner is willing to sue out a new fiat, if the present one is annulled; and he has sworn

(a) 1 Younge, 394.

that his debt is not anterior to that of the petitioning creditors.

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Mr. *Swanston*, and Mr. *K. Parker*, for the petitioning creditors. It cannot be collected from the evidence in the case, that the bankrupt's acceptance of these bills was a forgery. The clerk of the petitioning creditors swears expressly, that when he called on the bankrupt respecting the payment of the bills on the 25th January, the bankrupt without any hesitation said, that he was aware of his brother having accepted the bills in his name, and that his brother had authority from him to do so. The bankrupt's sister also in her affidavit states, that for some years past *William Latham* was in the habit of accepting bills by the authority of the bankrupt, *John Latham*. We therefore contend for the validity of the acceptance, not by virtue of a subsequent recognition, but of an antecedent authority. The case cited from the Exchequer (*a*) does not apply; for there the question was, that where an agent had indorsed bills under the authority of a power of attorney, the general words of which were held not to give a power to the agent to indorse bills, a subsequent recognition by the principal did not make the indorsement good. But here the evidence is, that *William Latham* had authority to accept the bills in the name of his brother, *John Latham*.

Mr. *Anderdon*, in reply, was stopped by the Court.

Sir JOHN CROSS.—The petitioning creditors in this case undertook to prove, when they sued out the fiat, that the bills in question were either accepted by the bankrupt himself, or by his authority. It is admitted,

(a) *Esdaile v. La Nauze*, 1 Young, 394.



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that they were not accepted by the bankrupt himself; but it has been contended that they were accepted by his authority. The only question is, therefore, whether the alleged authority was antecedent to the acceptance of the bills; because no subsequent acknowledgment of an acceptance, which was a forgery in the first instance, can render the acceptance binding in law. The respondents have not produced the bill for 300*l.*, on which the petitioning creditor's debt is founded; nor does it appear when the bill was presented for payment, or how it came to be dishonoured; and as to what was done by the holders of the bill as soon as it became dishonoured, we are left quite in the dark. It is stated in the affidavit of one of the respondents, that when they applied to *William Latham* for the payment of their debt, he told them that his brother *John* would give security for the amount. Now it seems to me not very prudent conduct on the part of a creditor, to whom his debtor delivers the acceptance of a third person as surety for the debt, not to have some personal communication with the surety, and to satisfy himself that the surety was willing to be bound for the debt of the principal. When Messrs. *Blackwall* sent their clerk to *John Latham* to make some arrangement as to the payment of the bills, they knew that *William Latham* was in custody on a charge of forgery; and that was the circumstance, which (as Mr. *R. Blackwall* in his affidavit says,) made him and his brother uneasy as to the genuineness of the acceptances. *John Latham* was also aware of that fact; and, although no threats may have been used to him by Messrs. *Blackwall* or their clerk, there is no doubt but that his knowledge of the danger in which his brother was placed induced him to make himself responsible for the payment of the

bills. The statement of the clerk, that *John Latham* verbally acknowledged that his brother had accepted the bills by his authority, is altogether at variance with the written acknowledgment, which was prepared by the clerk, and signed by *John Latham* at the clerk's request, and the terms of which clearly indicate an adopted responsibility. It is, in fact, just such an undertaking as a man would sign, who had given no previous authority. I am of opinion, that no authority was given by *John Latham* to his brother to accept the bills previous to the default in the payment of them, and the discovery of the criminal charge under which his brother was then labouring; and, therefore, that the bills were not duly accepted. There is consequently no good petitioning creditor's debt to sustain this fiat, which must be annulled at the costs of the party who sued it out.

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Fiat annulled, with costs.

Ex parte FRANCIS WOODWARD.—In the matter of JAMES HARDY.

Serjeants' Inn  
Hall,  
July 14,

THIS was the petition of a solicitor for the payment of the petitioning creditor's bill up to the choice of assignees, and also for the payment of extra costs incurred previous to such choice.

The petitioner stated, that he was employed by the petitioning creditor, who was afterwards chosen assignee, to act as his solicitor in issuing and prosecuting the fiat up to the choice of assignees; and that the petitioner's

Where a solicitor persuaded a party to sue out a fiat as petitioning creditor, (who was afterwards chosen assignee,) upon an invalid act of bankruptcy, which was concerted between the solicitor and the bankrupt, and there did not appear any

other act of bankruptcy to support the fiat; the Court refused to make an order on the assignee to pay the solicitor's bill of costs up to the choice of assignees.

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bill of costs for business done up to such choice was taxed by the Commissioners at the sum of 50*l.* 3*s.* 9*d.* That at the time of suing out the fiat, there were certain actions at law pending against the bankrupt for the recovery of large sums of money, in which the plaintiffs were in a situation to act upon their judgments against the estate and effects of the bankrupt. That, in order to protect the estate, it became necessary for the petitioner to take certain proceedings, as solicitor for the petitioning creditor, and which were continued for him afterwards in his character of assignee, though to a trifling extent. That in the course of such proceedings, certain charges, fees and disbursements were necessarily incurred, prior to the choice of assignees, to the amount of 55*l.* 17*s.* 8*d.*, which sum was not included in the taxed bill of costs, although the greater part thereof was incurred prior to such taxation; but that at a meeting of the bankrupt's creditors it was agreed by a third part in value of all the creditors, to allow the assignee to pay such extra costs. That the petitioner applied to the Commissioners at the audit meeting to tax his bill for extra costs, which they refused to do, on the ground that the allowance of such costs was a matter for the creditors, and not for the Commissioners.

The petitioner then alleged, that the assignee had received various sums of money, which were more than sufficient to satisfy the petitioner's claims upon him for the costs up to the choice of assignees, including such extra costs; and that the petitioner had shown to the assignee the taxation of the first mentioned bill of costs, and had also delivered to him copies of both bills of costs, signed by the petitioner as required by the statute, and then demanded the amount thereof; which the assignee had neglected and refused to pay.

In answer to the allegations contained in the petition, the assignee stated in his affidavit, that it was at the instigation and earnest request of the petitioner, that he, the assignee, became the petitioning creditor and assignee under the fiat; that the bill of costs amounting to 55*l.* 17*s.* 8*d.* was not just or reasonable, several of the charges in it relating to summoning the Commissioners and instructing the messenger under the fiat, and to attendances on the bankrupt and other persons for the purpose of superseding the fiat; and that the petitioner, on the 21st April last, commenced an action against the assignee in the Court of Queen's Bench for the recovery of the sum of 629*l.* 4*s.*, in which sum the assignee believed the amount of such bill of costs was included

The assignee then stated, that he had received the sum of 500*l.* under the fiat, which he had paid away to satisfy the lien of an equitable mortgagee, and in order to obtain the title deeds of an estate belonging to the bankrupt, which he the assignee had contracted to sell. That the purchaser refused to complete the contract, on the ground that the assignee could not make a good title to the property, alleging that the act of bankruptcy was void, as being concerted between the bankrupt and the petitioner. That he had received 106*l.* for deposits in part of the purchase money of other portions of the bankrupt's estate, but that none of such purchases had been completed, some of the purchasers threatening to file bills for specific performance against the assignee, and others threatening to bring actions for the recovery of their deposit money. That the assignee, by the advice of the petitioner, distrained on some of the bankrupt's tenants for sums due for rent, amounting to 13*l.* 7*s.*, one of which tenants had since brought an action against the

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assignee, to try the validity of the distress and of the fiat; and that the assignee was fearful that the other tenants might bring other actions against him, in the same manner. That, with the exception of this sum, the bankrupt had, ever since the issuing of the fiat, received the rents and profits of the whole of his property, and contested the right of the assignee to the same; that he had paid to the petitioner the sum of 20*l.* for half a year's interest, due on mortgage to the petitioner's brother, for which the petitioner gave a receipt; and that the assignee had paid out of his own purse, in respect of the bankruptcy, the sum of 150*l.*, no part of which he had received out of the bankrupt's estate.

This affidavit of the assignee was confirmed by those of two other deponents, as to the act of bankruptcy being concerted between the petitioner and the bankrupt; which they stated was done in the following way:—The solicitor, the bankrupt, *Spittle* the assignee, and *Cliff* a creditor of the bankrupt, being all assembled at the bankrupt's house after ten o'clock at night on the 24th December 1839, the solicitor entreated *Cliff* to sue out a fiat against the bankrupt as petitioning creditor, in order to avoid an execution which had been levied against the bankrupt's effects by a creditor at Birmingham. *Cliff* refused; upon which the solicitor persuaded *Spittle* to become petitioning creditor. The solicitor then requested the bankrupt to withdraw from the room; and the solicitor and *Cliff* also withdrew a short distance from the house. The solicitor then requested *Cliff* to wait a few minutes, till he instructed the bankrupt's servant. He then told *Cliff* to go to the door of the bankrupt's house, and inquire if he was within, and say that

he had called for some money, adding, that the servant would deny him, and that would be all he would have to do. *Cliff* acted according to the solicitor's instructions, and the bankrupt's servant said that he was not at home; upon which the solicitor came up and said "well, that is all right." They then went in again to the bankrupt's house, and the bankrupt was called in from the garden, and rejoined them, when the solicitor said, "It is all right now, we shall soon put the Birmingham gentlemen to rights, and their execution too."

The petitioner, in an affidavit made by him in reply, as to the alleged invalidity of the act of bankruptcy, swore that, previously to the issuing of the fiat, he consulted *Mr. Duncan Stewart's Treatise on Bankruptcy*, in which it is laid down, that, since the passing of the Bankruptcy Court Act, an act of bankruptcy may be legally concerted, and that he acted upon this doctrine in the advice he gave to the petitioning creditor to issue the fiat. And he further deposed, that it was the general understanding of the solicitors in the county of Stafford, that an act of bankruptcy may be concerted.

*Mr. Swanston*, and *Mr. K. Parker*, in support of the petition. The question is, whether the assignee has not sufficient funds in his hands to satisfy these two demands of the petitioner. The defence set up by the assignee, that the fiat is invalid and the act of bankruptcy concerted, is not a sufficient answer to the claim of the petitioner. With respect to the sum of 55*l.* 17*s.* 8*d.*, the amount of the extra costs, we do not contend that the resolution of the creditors at the meeting held for that purpose will absolutely bind the estate; but it will

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at least lay a foundation for the Court saying that those costs ought to be paid.

Mr. *Bacon*, for the assignee. With respect to the petitioning creditor's bill of costs up to the choice of assignees, the solicitor would no doubt have a right to an inquiry, whether the assignee had not got in sufficient assets to pay the amount of that bill; if the petitioner had not, by his own conduct, excluded himself from any right to the equitable interference of this Court. In regard to the other bill, the Commissioners refused to tax it, as it was a matter entirely for the consideration of the creditors. It is alleged in the petition, that at a meeting held for this purpose, it was agreed by a third part in value of all the creditors, that the assignee should pay the amount of these extra costs. But at this meeting only three persons were present; their concurrence, therefore, can never be said to bind the estate. The real ground for opposing the petition is, that the solicitor is not entitled to any consideration from this Court. By his improper conduct, or, at any rate, by his ignorance of the law, he has brought the assignee not only into peril, but into great actual loss. That the act of bankruptcy was concocted between the solicitor and the bankrupt, there can be no doubt; it is satisfactorily proved by three witnesses, whose testimony remains unshaken, and consequently renders the validity of the fiat impeachable by any party who thinks proper to dispute it. The assignee is already labouring under an action at law and a suit in equity, which have been brought for that purpose, and is threatened with others. Moreover, the petitioner has brought an action at law against the assignee, to recover the amount of the very demand

which is the subject of the present petition. But even if the petitioner had any equity to entitle himself to the indulgence of the Court, in directing an inquiry against the assignee, the assignee expressly swears that he has paid 150*L.* out of his own pocket; so that he has discharged himself from any claim in regard to assets. It is enough, however, to show on the present occasion, that the petitioner is not entitled, in equity and conscience, to the Order of this Court, but ought to be left to his action at law, with which he has already thought fit to harass the assignee.

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Mr. *Swanston*, in reply. The action at law, which has been alluded to, is to recover the sum of 600*L.*, which includes other demands besides those which form the subject of the present petition; but, if the Court will give us the Order we seek on this petition, we will undertake that the amount of the present demand shall be withdrawn from that action. Then, in regard to the alleged invalidity of the act of bankruptcy,—the assignee was a party to the whole transaction, and concurred in the act of bankruptcy, and is therefore not justified on this ground in disputing the claim of the solicitor for the payment of his bill, which is not a mere matter of equity, but of strict legal right. The validity of the fiat does not depend upon the act of bankruptcy appearing on the proceedings, but evidence may be given of any other act of bankruptcy. The question is here, as to the conduct of the solicitor—not the validity of the fiat, as on a petition to annul, when that point is put in issue. The solicitor has been guilty of no improper conduct; he swears that he was misled by a treatise of bankruptcy, in which it is laid down that an act of bankruptcy, since



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the passing of the Bankruptcy Court Act, may be lawfully concerted by the bankrupt; which he alleges is the general understanding of the solicitors in Staffordshire, to which county this fiat was issued. There is nothing, also, to show that the fiat may not be maintained upon another act of bankruptcy. But even if it could not, the solicitor is not to be mulcted of his costs, because he was led astray by a legal treatise, which is in great repute in that part of the country; he has been guilty of nothing worthy of moral reproach, and therefore ought not to be stigmatized for a mere error in judgment. The question for the Court to determine is, whether a practitioner, so circumstanced, is to be deprived of his right to compensation for business done, when he would otherwise be entitled as a matter of course to the common Order.

Sir JOHN CROSS.—This is an application by a solicitor for an Order of the Court, to compel an assignee to pay to him the amount of his bill of costs up to the choice of assignees, and also the amount of another bill, for other business done by him in the service of the assignee. On the part of the assignee, this demand is resisted, on the ground that the solicitor has been a party to a concerted act of bankruptcy, and has thereby rendered the fiat invalid. Now I would not have it understood for a moment, that, when a solicitor is employed to sue out a fiat, and he afterwards calls upon the assignee for the amount of his bill of costs, the assignee should take the solicitor by surprise, and endeavour to defeat his claim by repudiating the fiat. But, in the present case, nothing has been done by surprise; it is admitted by the solicitor, that an absurd act of bankruptcy has been concerted with the bankrupt, under the advice of the solicitor him-

self, and that in consequence of this ridiculous proceeding, a worthless fiat was built upon a bed of sand. The assignee has recovered nothing under it, and is unable to pay the solicitor out of the estate, as he cannot get in the effects, and no funds have accrued. This might have been no defence against the claim of a solicitor, who was employed by a party to sue out a fiat, and was a stranger to the act of bankruptcy: but here the evidence clearly shows the gross conduct of the solicitor, as a prominent party in contriving this act of bankruptcy, for the purpose of issuing a fiat. He first earnestly entreated *Cliff* to be petitioning creditor, and upon his declining, then persuaded the assignee to become such. It has been alleged that the fiat may be supported upon another act of bankruptcy; but there is nothing to show that another act of bankruptcy has been committed by the bankrupt; and the Court cannot take notice of any other act of bankruptcy, which does not appear on affidavit. I am clearly of opinion, that, this invalid fiat having been manufactured by the solicitor, he is not entitled to the Order of this Court for the payment of his costs of issuing it, but must be left to his remedy at law.

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Petition dismissed, with costs.

In the matter of DAINTRY and RYLE.—

MR. *Anderdon* applied for an order that the separate creditors of the bankrupt *Ryle* might be permitted to appoint an inspector to watch over the interests of his separate estate. The assignees had not yet been chosen; but, as they would no doubt be elected principally through

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The Court will not order the appointment of an inspector of the separate estate of one of the bankrupts, before the choice of assignees.

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the influence of the joint creditors, and as the separate estate of *Ryle* was considerable, the immediate appointment of an inspector would prove beneficial to the interests of the separate creditors.

Sir JOHN CROSS.—I never heard of such an application before the choice of assignees. It will be time enough to consider, after assignees are chosen, whether the interests of the separate creditors render it expedient that an inspector should be appointed.

Auxiliary fiat  
granted for the  
proof of debts.

Mr. *Anderdon* then in the same matter applied for an auxiliary fiat to be directed to Macclesfield, for the purpose of receiving the proof of various small debts. The bankrupts were bankers at Manchester, and they had circulated 5*l.* notes to the amount of 17,000*l.* at Macclesfield, and in the immediate neighbourhood. These notes were dispersed among the several inhabitants of that district, and were in the hands of various small shopkeepers, who found it inconvenient to go so far as Manchester where the fiat was worked, to prove for so small a sum. The consequence was, that several persons were buying up these notes, with an intent to set off the amount against their own debts to the bankrupts. It was therefore proposed to prevent this detriment to the estate, by having an auxiliary fiat, which would facilitate the proof of these notes by the several holders of them. He referred to the case of *Ex parte Poland* (a), where an auxiliary fiat was granted for the purpose of examining witnesses, who lived at a distance from the place where the fiat was worked.

(a) 1 Mont. Deac. & D. 178.

The COURT thought the application reasonable, and ordered an auxiliary fiat to be issued to Macclesfield, and to be directed to one Commissioner.

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and RYLE.

Ex parte JOHN DOVER.—In the matter of GEORGE WETWANG POPPLE, and ROBERT POPPLE.—

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July 16.

THIS was a petition for an order on the assignees to deliver up to the petitioner certain casks of oil which he alleged to be his property, and which the assignees had taken possession of on the bankruptcy.

The bankrupts were oil merchants at Hull, and the petitioner carried on the business of a merchant at London under the firm of *Hodgson Brothers and Dover*, as the surviving partner of that firm; but, being absent in France, had appointed *Thomas Christopher Hodgson* as his general agent to manage and conduct his business in his absence. On the 17th February last, the petitioner (by his said agent) purchased of the bankrupts ten tons of refined rape oil contained in nineteen casks, at the rate of 45s. per hundred weight; the amount of the price for which was agreed to be paid by the acceptance of the petitioner at four months' date. Upon the completion of this purchase, each of the casks containing the oil was weighed and numbered, and marked with the letter H., as the initial letter of the petitioner's firm; and they were afterwards separated from the rest of the bankrupts' stock. On the 17th February the bankrupts addressed a letter to petitioner containing an invoice of the oil, which specified the exact weight, number and mark of every

A., a merchant in London, on the 17th February, bought of B., an oil merchant at Hull, ten tons of oil, which was paid for by A's. acceptance for the amount of the price. Upon the completion of the purchase, the oil was drawn off from the cisterns in which B. kept his stock, and put into 19 casks, which were numbered and marked with B.'s initial, and removed into another warehouse, called the shipping warehouse, to await A.'s orders as to the shipment. On the 9th March A. demanded the delivery of the oil; but B., having then suspended payment, said that he could not deliver the oil, without authority. On the 3rd April a fiat was issued against B.

*Held*, that the oil was not in the possession of B., as reputed owner, within the meaning of the 6 Geo. 4. c. 16. s. 72., it being necessary to prove some reputation of ownership, besides the mere fact of possession, to bring a case within the provisions of that enactment.

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cask, and in which letter the bankrupts stated that the oil was waiting the orders of the petitioner for shipment, and that they thought it might be a convenience to him, if the oil was to lay with the bankrupts until they heard from him, and offering to ship it in any way that he liked. The petitioner, by his agent, accepted a bill drawn by the bankrupts for the sum of 452*l.* 13*s.*, the amount of the price of the oil, payable at four months; which bill the bankrupts had negotiated for value, and the amount of which the petitioner was liable to pay to the holders as soon as it fell due. On the 9th March last the petitioner sent an order to the bankrupts to deliver the oil to Messrs. *Thomas Wood & Co.* of Hull, on account of the petitioner; but on the following day *Wood & Co.* wrote to the petitioner, informing him that the bankrupts had suspended payment, and could not deliver the oil, without authority. The petitioner, having disposed of the oil conditionally in London, and having been informed that it was the intention of the bankrupts to call their creditors together, wrote again to *Wood & Co.* on the 15th March, acquainting them that the petitioner had disposed of the oil, and requesting to be informed when the intended meeting of the creditors would take place, in order that the petitioner might give the buyers the proper delivery order for the oil upon *Wood & Co.* In answer to this letter, *Wood & Co.* informed the petitioner that the meeting of the creditors took place on the 17th March, and that they *Wood & Co.* then claimed the oil, and that they expected to have no difficulty in following the petitioner's orders in shipping it. On the 20th March *Wood & Co.* wrote to the petitioner, saying, that they had again presented the order for the delivery of the oil to the parties appointed to

superintend the affairs of the bankrupts, when those parties said that they were not in a position to give *Wood & Co.* any answer, but that they certainly could not deliver the oil at present. On the 22nd March the petitioner wrote again to *Wood & Co.*, saying, that he had shown as much forbearance and consideration towards the parties interested in the affairs of the bankrupts as could be expected, and that he trusted no further delay would take place in delivering the oil; in reply to which, *Wood & Co.* on the 30th March wrote to the petitioner, informing him that they had again applied to the parties appointed to act, who said that they expected to be enabled to state something more fully on the morrow, as it was expected that something would be offered to the creditors with a guarantee, and that the bankrupts would then be at liberty to deal with the oil of the petitioner. On the 3rd April *Wood & Co.* addressed another letter to the petitioner, informing him that nothing decisive was done in the affairs of the bankrupts before the day previous to the date of that letter, when the parties employed to take the management of their affairs found so much difficulty in the arrangement, that they came to the conclusion of letting them go through the Gazette, and that on that very morning the fiat had been issued. On the 6th April the adjudication of bankruptcy appeared in the London Gazette; upon which the petitioner's solicitor on the 8th April addressed a written notice to the solicitor who issued the fiat, informing him that the nineteen casks of oil, the numbers and marks whereof were specified in the particulars therein inclosed, and which were set apart from the rest of the stock of the bankrupts in the warehouse lately occupied by them, were the property of the petitioner, and requesting to be informed of the

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names of the assignees, as soon as they were chosen, in order that he might make the requisite formal demand of the oil from them. On the 28th April, the solicitor to the fiat wrote in answer, that the assignees were being advised on the subject of the petitioner's claim, and would act in accordance with the advice they might receive. The petitioner's solicitor waited for the determination of the assignees until the 8th May, when he wrote again for a decisive answer as to the delivery of the oil, and complaining of the delay. In reply to this last application, the solicitor of the assignees informed the petitioner's solicitor, that the assignees were advised that the oil belonged to the estate of the bankrupts, and were determined to resist any proceedings for the recovery of it.

It appeared from the affidavits of one of the bankrupts, and of their clerk, in support of the petition, that at the time of the sale the oil was in cisterns; and that after the sale, and previously to the invoice being made out, it was drawn out of the cisterns into nineteen casks, which were immediately weighed, marked and numbered, as stated in the petition, *and were afterwards set apart by themselves in the shipping warehouse* of the bankrupts, to be ready for the order of the petitioner for shipment, and *were never afterwards mixed with, or placed amongst, the stock* of the bankrupts. That it was usual for the bankrupts in carrying on their business, when a purchaser of oil resided at a distance from Hull, to keep the oil a reasonable time after the sale, to await the orders of the purchaser for shipment; and that no customer of the bankrupts, nor any person who transacted business with them, or attended or frequented their warehouse, could, by seeing the nineteen casks of oil in the shipping warehouse, be deceived into the supposition, that the same formed part of the bankrupts' stock.

It was also proved by the evidence of two brokers at Hull, who stated themselves to be well acquainted with the custom of the oil trade at that place, that it was customary for the oil merchants there, when a purchaser of oil resided at a distance, to keep the oil a reasonable time in warehouse for shipment; and that no person acquainted with the oil trade could be misled, by supposing that these casks of oil, marked and separated as they were from the rest of the bankrupts' stock, were still at the disposal of the bankrupts.

The only material evidence opposed to the claim of the petitioner was that of three oil merchants, who stated that it was common in the oil trade, when casks of oil have been once marked with an initial letter and numbered, for such initial mark and number to remain without any alteration or addition, although the *oil* may have been from time to time sold and transferred to subsequent purchasers.

Mr. *Swanston*, and Mr. *Deacon*, in support of the petition. As the oil was *bonâ fide* purchased and paid for by the petitioner, before the bankruptcy of Messrs. *Popple*, and the casks were weighed and numbered, and marked with the initial letter of the petitioner's firm, and were moreover set apart from the rest of the bankrupt's stock in their shipping warehouse, the oil could not be considered in the reputed ownership of the bankrupts. The case of *Ex parte Flyn* (a), which occurred so long ago as in the time of Lord *Hardwicke*, appears to be decisive in favour of the claim of the petitioner. The facts of that case were very similar to those of the present. There, one *Mattheus* had sold to the peti-

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(a) 1 Atk. 185.



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tioners two-thirds of 500 barrels of tar, and the other third he agreed should be consigned to the petitioners for sale at his risk and on his own account, and that he should be at the charge of shipping off the whole. *Matthews* caused the tar to be put into a warehouse of his own, for the purposes of the agreement; but made out a bill of parcels for the petitioners of the two-thirds which they had purchased, and the petitioners paid *Matthews* the amount of the price. *Matthews* afterwards became bankrupt, and his assignees took possession of the tar, as they found it remaining in his warehouse; and it was held by Lord *Hardwicke*, that this was not within the intent of the 21 *Jac.* 1. c. 19. s. 11., which meant to guard leaving goods in the possession, order and disposition of the bankrupt; for that it was only a mere temporary custody of the tar, until the petitioners had an opportunity of shipping it off to Ireland; and he declared the petitioners to be entitled to two-thirds of the tar, which he accordingly ordered to be delivered up to them by the assignees. In the more recent case also of *Ex parte Marrable (a)*, the same doctrine was held; where a quantity of wine, which the bankrupt had sold previous to his bankruptcy, remained in his cellar, set apart in a particular bin, and marked with the purchaser's seal; and it was held, that the wine was not in the possession of the bankrupt, under such circumstances as to deceive his creditors, by the appearance of its forming part of that stock to which they might give credit; and the assignees were ordered to deliver up the wine. It does not appear in the present case, that any persons were or could be deceived, by supposing this oil to be the property of the bankrupts, or that they acquired any

(a) 1 G. & J. 402.

false credit with any persons with whom they dealt, by the reputation of its ownership. Neither does it appear, that the oil remained in the shipping warehouse of the bankrupts an unreasonable time after the sale, before the delivery of it was demanded by the petitioner; for the sale was on the 17th February at *Hull*, and the petitioner on the 9th March ordered the bankrupts to deliver it to *Wood & Co.* This was nearly a month before the bankruptcy; for the fiat was not issued till the 3rd of April; and now, by the 2 & 3 *Vict. c. 29*, all transactions with the bankrupt before the date and issuing of the fiat against him are rendered valid, notwithstanding any prior act of bankruptcy, provided the persons so dealing with the bankrupt had not notice of such act of bankruptcy. If, therefore, the petitioner had demanded the oil the very day before the issuing of the fiat, and without notice then of any act of bankruptcy, the oil would not have passed to the assignees; *Smith v. Topping (a)*. Its continuing in the possession of the bankrupts therefore at the time of their bankruptcy, was not with the consent of the petitioner, the true owner; but by the procrastination of the committee of the creditors of the bankrupts, who declined to deliver it to *Wood & Co.*, and put them off with various excuses from time to time until the issuing of the fiat.

The case of *Knowles v. Horsfall (b)* may probably be relied on by the other side; but it will be found on examination to be distinguishable from the present. In that case the bankrupt had sold to the plaintiff several casks of brandy, which were thereupon marked with the plaintiff's initials; but it was agreed between the parties,

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(a) 5 B. &amp; Ad. 674.

(b) 5 B. &amp; Ald. 134.

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that the brandies should remain in the bankrupt's vaults, *until it suited the convenience of the plaintiff to remove them*; and it was held, that the brandies passed to the bankrupt's assignees, as goods in his possession, order and disposition, by the consent and permission of the true owner, within the 21 Jac. 1. c. 19. s. 11. But, there, it will be observed, that the brandies were to remain in the vendor's cellars for *an unlimited length of time*, and were accordingly found in his possession at the time of his bankruptcy, with the consent of the true owner. In the present case, the oil was only to remain in the bankrupts' warehouse *until it could be shipped*, and it was not in the possession of the vendors at the time of their bankruptcy, with the consent of the true owner; for it was demanded of them nearly a month before. It is very doubtful, also, whether the judgment in *Knowles v. Horsfall*, if strictly scrutinized, would be found to be based on sound principles of law; for Lord *Tenterden* decided it on the ground, merely, that the brandies were *in the possession, order and disposition* of the bankrupt, without adverting to the subsequent words of the 11th section of the statute of *James* "whereof they shall be *reputed owners*, and take upon them the sale, alteration, or disposition, as owners." Now there was certainly in that case no evidence of reputation of ownership, but quite the contrary; for it was notorious to the persons carrying on the wine trade at the place where the parties resided, that the brandies had been sold to the plaintiff. Another case may be cited against the position for which we are contending, and that is *Thackthwait v. Cock* (a); but the decision, there, is much weaker against the claim of the petitioner, than in the former case referred to. A quantity of hops which had

(a) 3 Taunt. 487.

been purchased of the bankrupt were left by the purchaser in the bankrupt's warehouse, for the purpose of resale, and were wholly undistinguished by any mark from the bankrupt's other goods, and were also exposed to the view of persons coming into the warehouse to purchase, promiscuously with the other goods of the bankrupt; under these circumstances, therefore, the Court of Common Pleas of course decided that the hops were in the possession, order and disposition of the bankrupt, within the statute of *James*. The present case is very distinguishable from the two last cited, and we submit is clearly not within the enactment of the present bankrupt law, 6 Geo. 4. c. 16. s. 72., which provides "that if any bankrupt, at the time he becomes bankrupt, shall, by the *consent and permission of the true owner* thereof, have in his possession, order or disposition, any goods or chattels, whereof he was *reputed owner*, or whereof he had *taken upon him the sale, alteration, or disposition, as owner*, the Commissioners shall have power to sell and dispose of the same &c." Now here the oil was not in the possession of Messrs. *Popple*, at the time they became bankrupt, *with the consent and permission of the true owner*; nor is there any evidence that they were either the *reputed owners* of the oil, or that they had *taken upon them the sale, alteration, or disposition, as owners*.

Mr. *James Russell*, and Mr. *Anderdon*, for the assignees. We submit that the oil in question was in the possession, order, and disposition of the *Popples*, at the time of their bankruptcy, within the meaning of the 72nd section. The case of *Ex parte Flyn* (a), which has been relied on by the other side, does not apply; for

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(a) 1 Atk. 185.

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there the bankrupt and the petitioners were tenants in common of the tar, the petitioners being entitled to two thirds, and the bankrupt to one third ; so that the bankrupt's possession of the tar would not bring the case within the clause of reputed ownership. The decision of the Court of King's Bench in *Knowles v. Horsfall* (a) is conclusive in favour of the assignees ; for there, although it was notorious to persons in the wine trade that the bankrupt had sold the brandies to the plaintiff, and no persons in the same trade therefore could have been deceived as to who was the real owner, yet the Court held that it was not sufficient that the sale should be known only to persons in the same trade ; for that, if any person who was not in that trade had gone to the bankrupt to purchase the wines, the bankrupt would have had the power of selling and delivering them to such person. It is clear, therefore, from the doctrine laid down in that case, that, if the bankrupt's continued possession of goods renders it only possible that he may be considered the owner of them, they are to be accounted as in his order and disposition, within the meaning of the statute. In *Lingham v. Biggs* (b), it was observed by Lord C. J. *Eyre*, that questions on the 21 *Jac.* l. c. 19. s. 11. had much more of fact, than of law in them, and that being allowed to have the possession of goods under circumstances which give the reputation of ownership, brings the case within the statute, provided the possession is accompanied with the apparent power of selling. Now, try the present case by that test. Had not the bankrupts the apparent power of selling this oil to any person who chose to buy it of them ? It continued to lie in their warehouse, as before the sale, and

(a) 5 B. & Ald. 134.

(b) 1 Bos. & P. 87.

they had complete dominion over it. *Monkhouse v. Hay* (a), which was decided on a writ of error in the Exchequer Chamber, is also a strong authority against the claim of this petitioner. There the bankrupt had assigned a ship to A., in trust to pay a debt due to A. and his partners, but with their permission retained the possession and disposition of the ship at the time of his bankruptcy; and it was held, that the ship passed to the assignees by virtue of the 21 Jac. 1. c. 19. s. 11., although, before the act of bankruptcy, the register of the ship was indorsed to A., and shortly afterwards (three months before the issuing of the commission) the ship was newly registered in his name, and continued so registered at the time the commission was issued. The present case is not like that of *Ex parte Marrable* (b), which has been relied on by the counsel for the petitioner; for there a formal instrument was signed by the bankrupt, stating that he held the wines subject to a particular arrangement; the bankrupt was, therefore, in that case held to be a mere trustee for the petitioner. In *Shaw v. Harvey* (c), also, it was decided that wherever goods remained in the bankrupt's apparent possession at the time of his bankruptcy, they passed to his assignees. It is immaterial for how long, or how short a period of time, the goods continue in his possession, if they are in his order and disposition. Supposing the oil in question had been resold by the bankrupt to another person, who had no notice of the previous sale,—can there be a doubt but that in such case the oil would have passed to the second vendee, in preference to the first?

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(a) 2 Brod. &amp; B. 114.

(b) 1 G. &amp; J. 402.

(c) 1 Ad. &amp; E. 920.

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Mr. *Swanston*, in reply, was stopped by the Court.

Sir JOHN CROSS.—The only question in this case is, whether the mere fact of these 19 casks of oil being in the possession of the bankrupts at the time of their bankruptcy, is conclusive that they were reputed owners of the oil, without any consideration of the circumstances under which that possession was retained. Now, what are the facts which have been established in evidence? It appears that on the 17th February the petitioner bought of the bankrupts 10 tons of oil, which was then contained in cisterns forming part of their general stock, and that on the sale being completed the quantity of oil so purchased was drawn off from the cisterns, and put into 19 casks, which were all numbered and marked with the initial letter of the petitioner's firm, and removed into a distinct and separate warehouse from that where the ordinary business of the bankrupts was carried on; a warehouse in which there is no distinct evidence that any other oil was placed, except for the purpose of shipment. The petitioner paid for the oil, and the bankrupts wrote him word that it might lie in their warehouse, until they received his orders for its being shipped; which, it appears, is the usual course of the oil trade at Hull. The oil therefore must be considered, in law, as in the state of goods bargained and sold by the bankrupts to the petitioner; and the latter has made out a clear case that the oil is his own property, subject only to the provisions of the act of parliament that relate to reputed ownership. The assignees must therefore make out their right to retain this oil, under the provisions of the act in question, notwithstanding it may be the property of another person. Now, what are the words of the

statute, under which alone they can establish this right? The 6 Geo. 4. c. 16. s. 72. enacts "that if any bankrupt at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the Commissioners shall have power to sell and dispose of the same for the benefit of the creditors." What proof has been adduced by the assignees of their right to keep this property from one who has proved himself to be the true owner of it? Have they offered, in the first place, any evidence that the bankrupt was the *reputed owner* of the oil? There is certainly no direct evidence of that fact; for not one person has sworn that he believed him to be the owner of the 19 casks of oil. At the same time I am free to admit, that if, from all the facts of the case, an irresistible conclusion could be drawn that the bankrupt was the reputed owner of this property, I should think myself bound, without requiring direct proof on the subject. But, did the bankrupt (in the words of the act of parliament) *take upon himself the sale, alteration, or disposition of the oil, as owner*? It is not pretended that he ever took upon himself to do so. The case of *Knowles v. Horsfall* (a) and other cases have been referred to in the course of the argument, where the Courts have come to the decision, that, under certain special circumstances, goods found in the possession of the bankrupt at his bankruptcy must be considered in his reputed ownership. But, without impeaching the authority of *Knowles v. Horsfall*, it is sufficient to say that the

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(a) 5 B. &amp; Ald. 134.



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present case differs from that in a material fact, namely, that, whatever may have been the reputation of ownership, the oil in this case did not continue in the possession of the bankrupts at the time of their bankruptcy, with the consent and permission of the true owner ; for it was demanded of them on the 9th March, and the fiat was not issued before the 3rd of April ; the period of the issuing of the fiat being now (by the recent statute of 2 & 3 Vict. c. 29.), substituted for the act of bankruptcy, in relation to all dealings and transactions with the bankrupt. But, independently of this feature of the case, I found my judgment upon the absence of all evidence of reputed ownership. The oil, when bought, was separated from the other stock of the bankrupts ; the casks containing it were marked with the petitioner's initials, and put into another and distinct warehouse ; and there is no evidence that any human being but the bankrupts' servants ever saw them in the shipping warehouse. As in the case of the wine stowed away in the dark cellar of the wine merchant, so, in the present case, I think it would be most unjust to hold, as against the true and lawful owner, that these casks of oil were in the reputed ownership of the bankrupts, because they happened to be found in some corner of their premises, although out of sight of all their customers. I can find nothing whatever in this case leading to the conclusion of reputed ownership, except the mere fact of possession ; and that, in my opinion, is not enough to bring the case within the statute. It has been suggested, that the matter might be referred to the decision of another Court, by directing an issue or an action at law ; but, as I have no doubt both on the law and facts of the case, that proceeding would

be an unnecessary waste of time and money to all parties concerned.

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ORDER, that the assignees should deliver up the oil to the petitioner, and pay him his costs, which, with their own costs, they were at liberty to retain out of the estate.

Ex parte WILLIAM PENNELL and others.—In the matter of THOMAS KEASLEY and JOSEPH LEONARD KEASLEY.—

THIS was the petition of assignees to expunge a proof which had been made by an annuity creditor, for the value of the annuity.

By indenture, bearing date the 19th June 1837, and made between the two bankrupts of the first part, *Wm. Keasley* of the second part, and *Rich. Ullathorne* of the third part, after reciting an agreement between *R. Ullathorne* and the bankrupts for the purchase by *R. Ullathorne* of an annuity of 800*l.*, and that it was agreed that the same should be secured by that indenture, and also by the warrant of attorney of the bankrupts and of *W. Keasley* as their surety, it was witnessed, that in consideration of the sum of 1000*l.*, and of a bill of exchange for 3000*l.* paid and delivered to the bankrupts by *Ullathorne*, they, the bankrupts and *W. Keasley*, did grant unto *Ullathorne* for the lives of five persons therein named, and the life of the survivor of them, an annuity

*Serjeants' Inn  
Hall,  
July 16 and 24,  
A. and B., for a  
valuable con-  
sideration paid  
to them, join  
with C., as their  
surety, in grant-  
ing an annuity  
to D.; and the  
three jointly,  
and any two of  
them separately,  
covenant that  
the three, or  
some or one of  
them, shall well  
and truly pay  
the annuity. A  
warrant of attor-  
ney, of even date  
with the inden-  
ture, was also  
given by the  
three as a colla-  
teral security;  
and it was  
thereby de-  
clared that the  
judgment to be  
entered up on  
the warrant of  
attorney should  
be considered as  
a further secu-*

*rity to D. A. and B. afterwards became bankrupts.*

*Held*, 1st, That *D.* might prove against the estate of *A.* and *B.* for the value of the annuity.

2nd, That the covenant to pay the annuity was not merged in the judgment.

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of 800*l.*, payable quarterly. And the bankrupts and *W. Keasley*, and each and every of them, did thereby for themselves jointly, and any two of them separately and apart from the other of them, and each of them for himself severally, covenant with *Ullathorne*, that they the said bankrupts and *W. Keasley*, or some or one of them, should well and truly pay the annuity. But it was provided, that if the bankrupt and *W. Keasley* should pay unto *Ullathorne* 400*l.* by equal quarterly payments in every year for the first four years and a half after the date of the indenture, or within one month after notice in writing given by *Ullathorne*, then *Ullathorne* engaged during such four years and a half, but not further, to accept such reduced sum of 400*l.* in lieu and satisfaction of the annuity of 800*l.*, and so in proportion for so much of such annuity as should remain unredeemed. There was also a condition on the part of *Ullathorne*, that if the bankrupts and *W. Keasley*, or any of them, should, after the 19th June 1840, be desirous of redeeming the annuity of 800*l.*, or any part thereof, not being less at any one time than 200*l.* thereof, and should give three months' previous notice to *Ullathorne*, then *Ullathorne* should receive the sum of 1000*l.* for the re-purchase of such 200*l.* of the annuity, and so in proportion for any larger sum. And it was further agreed, that the judgment to be entered up on the warrant of attorney was intended and should be considered only as a *further security* to *Ullathorne* for the annuity of 800*l.*, and that no execution should be issued upon it, unless the annuity should be in arrear for the space of one month after notice and request in writing to pay it.

The warrant of attorney referred to in the above indenture was of even date with the indenture, and was

stated, by a memorandum indorsed on it, to have been given as a security *collaterally* with the indenture, for securing the annuity of 800*l*.

On the 7th July 1837, judgment was signed on the warrant of attorney mentioned in the above indenture against the bankrupts and *W. Keasley* jointly, for the sum of 8000*l*.; which judgment was still in full force.

One-fourth part of the annuity had been re-purchased, prior to the issuing of the fiat.

On the 10th February last *Ullathorne* was admitted to prove against the joint estate of the bankrupts for the sum of 90*l*. for arrears of the annuity, and also for the sum of 2994*l*., being the amount ascertained by the Commissioners as the value of the unredeemed portion of the annuity. The assignees subsequently applied to the Commissioners to expunge the proof, on the ground that the annuity was granted by the bankrupts and *W. Keasley* jointly, and each of them separately, and that a joint judgment had been entered up against all the three; but the Commissioners declined to expunge the proof.

*Mr. Spence*, and *Mr. J. Russell*, in support of the petition. The annuity creditor in this case has a higher security than the covenant to pay the annuity, having obtained a joint judgment against the bankrupts and *W. Keasley*: he cannot therefore come to prove for a gross sum, as for the value of the annuity, when he has got a judgment for his debt. The Court some time ago laid down this principle in *Ex parte Christy (a)*, where *B.* and *C.*, being indebted to *A.*, gave him a joint and several bond, and *A.* took, as part of the same security,

(a) *Mont. & B.* 352; 2 *Deac. & C.* 155.

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and others.

a joint warrant of attorney, and entered up a joint judgment; and it was held, that the bond was merged in the judgment, and that *A.* could only prove against the joint estate of *B.* and *C.* [Sir *John Cross.* In that case the judgment was for a specialty debt: here it is merely a collateral security for payment of the annuity.] The covenant by the two bankrupts is not that those two should pay the annuity, but that they and *W. Keasley* should pay it; for the grant of the annuity is not by the two, but by the three; and the creditor has endeavoured to make out that he has a right to prove, as for an annuity granted by the two. Before the 49 *Geo. 3.* c. 149., an annuity creditor could only prove for the value of the annuity, if it was secured by a bond, and the bond was forfeited before the bankruptcy: if it was merely secured by covenant, he could then prove only for the arrears; and then came the 6 *Geo. 4.* c. 16. s. 54., which enabled the creditors to prove for the value of the annuity, by whatever assurance it might be secured, as well as for the arrears. But to prove against whom? Why against the persons granting the annuity; not against those who covenant that the grantors shall pay it. The covenantee in this case cannot prove on the covenant against the covenantors; for it is in its nature not proveable; being a covenant not that the two bankrupts shall pay the annuity, but that they and another person shall pay it. The creditor here comes merely to prove for the value of the annuity, under the 54th section; and the question is, who are the grantors? Now, the grant is by the three jointly, or each of them separately; he cannot therefore prove for the value of the annuity against the two.

*Mr. Swanston*, and *Mr. Anderdon*, contrâ. The ques-

tion in this case is, whether the two bankrupts are not annuity debtors, within the meaning of the act of parliament. If the Court should hold that they are not, then we say that the act of parliament has not provided for a case of this description. Now it appears from the deed, that the bankrupts received the consideration for the annuity, and that *W. Keasley* merely joined in the grant and the covenant as surety. The covenant is by the three, or any two of them, to pay the annuity; and we have proved against the two. What are the words of the 54th section? "That any annuity creditor of any bankrupt, *by whatever assurance* the same may be assured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity." Now, they on the other side, in order to prevent us from proving for the value of this annuity, must be driven to contend that a covenant is not an *assurance*. Their proposition is, that you cannot, under a covenant by two persons to pay an annuity, prove against those two, because a third person joined with the two in granting the annuity. [Sir *J. Cross*. Here the three grant, and the two covenant to pay: the only question is, therefore, whether the covenantors are not to be considered the debtors to pay the annuity, as well as the grantors.] The real debtors to pay the annuity are the principals who received the consideration for granting it, not the surety who joined them in the grant. This appears from the decision of the Court of Common Pleas in *Thompson v. Thompson (a)*, where it was held that the instalments of an annuity, for the payment of which a bankrupt is surety only, and which he covenants to pay in case of the default of the grantor, are

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(a) 2 Bing. N. C. 168.

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not, where they become due after his bankruptcy, proveable under a fiat against the surety. In the present case, therefore, if *W. Keasley*, the surety, had become bankrupt, he could not have proved for the value of the annuity against his estate, but only for such arrears as were due before his bankruptcy, consequently the first objection to the proof, because it was granted by the two bankrupts and *W. Keasley* jointly, is of no avail. The debt is the debt of the two, and we have a distinct contract by the two, that the three, or the two, shall pay the debt.

The other objection to the proof, that a joint judgment has been entered up against the three, and therefore that the covenant is merged in the judgment, is equally untenable. In *Ex parte Christy* (a), which has been cited by the other side, the bond was held to be merged in the judgment, because it was not a case of collateral security, but a security given by the same parties founded on the original bond. Here the original debt was the contract of the two bankrupts to grant the annuity, and the warrant of attorney was only given by them and *W. Keasley*, as a collateral security. But in proceedings in bankruptcy, a judgment is not always considered to extinguish a debt of an inferior degree. Thus, in *Bryant v. Withers* (b), it was held that a debt for money lent, due to a creditor at the time when an act of bankruptcy was committed by the debtor, was sufficient to support a commission against him, although afterwards, and before petitioning for such commission, the creditor obtained judgment against him for a sum of money including such debt; and that the affidavit, made in order to obtain the commission, might be an affidavit of debt for money

(a) Mont. &amp; B. 352; 2 Deac. &amp; C. 155.

(b) 2 M. &amp; S. 123.

*lent*. What Lord *Ellenborough* says in that case is very strong in support of the right of proof in this. In allusion to Lord *Hardwicke's* judgment in *Ambrose v. Clendon* (a), which had been referred to in the argument, he says, that "it was founded on this, that although the bond was an extinguishment with regard to the bankrupt himself, because it was a debt of a higher nature, yet, in the proceeding under a commission of bankrupt, both debts were the same, or, in other words, in bankruptcy the creditors all come *in pari passu*." And he asked, "whether this was really and truly less a debt for money lent, because it had, to certain intents, been changed by the judgment? Still it might be for money lent, though, for the better securing the money, the creditor had obtained a judgment." The same doctrine was acted upon in *Twopenny v. Young* (b); where *B.*, being indebted to *A.*, procured *C.* to join with him in giving a joint and several promissory note for the amount, and afterwards having become further indebted, and being pressed by *A.* for further security, *B.* by deed (reciting the debt, and that for a part a note had been given by him and *C.*, and that *A.* having demanded payment of the debt, *B.* had requested him to accept a *further* security) assigned to *A.* all his household goods as a *further* security, with a proviso, that he should not be deprived of the possession of the property assigned, until after three days' notice; and it was held, that this deed did not extinguish or suspend the remedy on the note, but that *A.* might, notwithstanding the deed, sue *C.* at any time. Mr. Justice *Holroyd*, in delivering his judgment in that case, says, "It is clear, from the recital of the deed, that it was intended that the note should continue an existing

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PENNELL  
and others.

(a) 2 Str. 1042.

(b) 3 B. &amp; C. 208.



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Ex parte  
FENNELL  
and others.

security, and the deed is not strong enough to operate by law in destruction of that intention;" and he added, that he did not rely upon the other points in the case, "but upon the intent appearing on the face of the deed." The decision of this Court in *Ex parte Bate* (a), is precisely to the same effect. We here, therefore, rest with confidence on the intention of the parties being manifest in this case, that the warrant of attorney and judgment thereon were not to supersede the effect of the deed, but were merely to operate as a collateral security.

Mr. *Spence*, in reply. It must be remembered, that in this case the grant of the annuity is by the three; and, that the covenant to pay it, on which the creditor now seeks to avail himself, is by the two; the covenant, moreover, is not that the two bankrupts shall pay the annuity, but that the three shall pay it; the grantors and covenantors therefore are not the same persons. But this judgment prevents the creditor from resorting to the covenant; for you cannot proceed on a covenant to recover the arrears of an annuity, where you have already recovered a judgment for those very arrears. All that was decided in *Thompson v. Thompson* (b) was, that it was a sufficient objection to the proof against the surety, that there were no arrears of the annuity due at the period of his bankruptcy,—not that the value of the annuity could have been proved, either against one party or the other, under the 54th section of the act of parliament. The principle, also, on which this Court proceeded in *Ex parte Christy*, has been misapprehended by the other side; the foundation of that judgment being, that the creditor having entered up a joint judgment

(a) 3 Deac. 358.

(b) 2 Bing. N. C. 168.

against the bankrupts upon a joint and several bond, he could not afterwards resort to the former security.

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Sir JOHN CROSS.—My first impression was, that this was the case of a covenant by the three to pay the annuity, and that the judgment was against the three. But I find, that the covenant is by the three jointly, and by any two of them separately. If this covenant is to be considered as merged in the judgment, then the creditor will of course not be an annuity creditor, but only a judgment creditor. My present construction of the terms of the grant of the covenant in the deed is, that the annuity was granted by the three, and the covenant was a joint and several covenant that the three, or two, or one of them should pay it. But as it is an important point, I will take time to consider of my judgment.

*Cur. adv. vult.*

Sir JOHN CROSS.—In this case the two bankrupts, together with one *W. Keasley*, in consideration of 4000*l.* paid to the bankrupts, granted to the petitioner an annuity of 800*l.* during the lives of several persons named in the deed. The Commissioners have admitted a proof of the annuity debt against the joint estate of the two bankrupts, and valued it, pursuant to the statute, at 3084*l.* The assignees have applied to this Court to expunge the proof, and they advance two objections to it. The first is, that the debt is the joint and several debt of three persons, and cannot therefore be charged against two of them jointly; and the second objection is, that the petitioner, under a warrant of attorney, given together with the deed, has entered up judgment against the three jointly; whereby the original debt is merged in the joint

July 24.

1841.

Ex parte  
PENNELL  
and others.

judgment. It is clear from the authorities cited in the argument, that the merger of a debt in a higher security may be prevented by the act and intention of the parties; and that a judgment does not necessarily extinguish a prior debt. And there appears no doubt of the intention of the parties in the present case; for they have expressly "declared and agreed that the *warrant* of attorney for entering up the judgment is given as a security *collaterally* with the indenture, bearing even date therewith," and also "that the *judgment* shall be considered only as a *further security* for the annuity." And it seems to me repugnant to reason, that a future annuity debt should be merged in a by-gone judgment. I am therefore of opinion, that the debt in question is not merged, and that the annuitant is entitled to the full benefit of the annuity deed, as if the judgment had not existed. This being the case, we must refer to the deed itself, in order to ascertain whether the annuitant is warranted in charging the debt against *any two* of the three grantors. It appears by the deed, that the consideration was paid to the two bankrupts, and that *W. Keasley* became a party to the deed, as a surety for the other two. By the terms of the deed the three *Keasleys*, and *each and every of them*, grant the annuity, and then follows the covenant for the payment, and it is in these words—"The three grantors, for themselves, their heirs, &c. *jointly*, and *any two of them* separately and apart from the other of them, do hereby for themselves, their heirs, &c. *jointly*, and *each of them separately* and apart from the others and other of them, doth hereby for himself, his heirs, &c. severally covenant, promise and agree with and to the said *R. Ullathorne*, his executors, &c. that they (the three) or *some* or one of them, or their, *some* or one of their heirs, &c.

shall and will well and truly pay the said annuity." There appears to be some confusion and tautology in this covenant, yet I think the clear intention of it is to bind *any two* of the three, as well as any one, and all, to the payment of the annuity; and therefore that the Commissioners have done right in admitting the proof against the two bankrupts, and that the petition of the assignees to expunge the proof must be dismissed.

1841.

Ex parte  
PENNELL,  
and others.

Petition dismissed; costs of both parties out of the estate.

Ex parte WOOD.—In the matter of CHRISTOPHER WEBSTER.

Serjeants' Inn  
Hall,  
July 17.

THIS was the petition of a joint creditor, on behalf of himself and others, stating a surplus after payment of the separate creditors in full, and praying a declaration of the Court that the joint creditors were entitled to dividends out of this surplus fund. The bankrupt had been a partner in a Joint Stock Banking Company, which had become insolvent; but he had paid up the calls upon all his shares, and at the time of the failure of the bank, he had a balance of 1000*l.* lying there. The creditors of the bank had proved as joint creditors under a separate fiat issued against the bankrupt, so that the surplus of his estate was now claimed in discharge of the debts of the banking company in which he had been a shareholder. The bankrupt had died since the issuing of the fiat. The main question was, whether the joint creditors were entitled to receive dividends on their proofs, until the separate creditors had received interest on the amount of their debts.

Joint creditors, who have proved under a separate fiat, are entitled to receive a dividend on their proofs out of the surplus of the separate estate, before the separate creditors are paid interest on their debts.

A petition by joint creditors for this purpose should be served upon the bankrupt's executor.

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Wood.

Mr. *Swanston*, and Mr. *Anderdon*, in support of the petition. This petition is presented under the 62nd section of the 6 *Geo. 4. c. 16.*, which enables any creditors to whom a bankrupt is indebted jointly with any other partners of a firm of which the bankrupt was a member, to receive dividends out of the separate estate of the bankrupt, as soon as the separate creditors have received the full amount of their respective debts. This section has superseded the provisions of the former general order (*a*), as to disposing of the surplus of the separate estate. But the rule that was always acted upon before the statute was, that where there was a surplus of the separate estate, that surplus shall not go immediately to pay such interest to the separate creditors, but should first be applied to make the joint creditors equal with the separate creditors, as to the principal of their respective debts; *Ex parte Reeves* (*b*). This is only consistent with the rule in equity, which permits a joint creditor, though his debt, at law, continues only against the surviving debtors, to resort in equity to the assets of a deceased partner; *Devaynes v. Noble* (*c*). The objection made to this petition by the bankrupt's executor is, that there is some outstanding suit of the banking company still depending; but to this suit neither the assignees, nor the bankrupt's executor, are parties.

Mr. *J. Russell*, on behalf of the executor, objected to any Order being made on this petition, as the executor of the bankrupt had not been served with it.

(*a*) Lord *Loughborough's* General Order, 8 March 1794; 2 Deac. B. L. 89.

(*b*) 9 Ves. 590. There is nothing in the 6 *Geo. 4. c. 16.* to vary this rule. *Ex parte Minchin*, 2 G. & J. 287.

(*c*) 1 Meriv. 529.

Mr. *Swanston*. The bankrupt can have no right to any part of the surplus, until all the joint debts are paid as well as the separate debts, together with interest upon each description of debts. If the Court, however, should think that the bankrupt's executor has a right to be heard upon this occasion, it will not forget that the petitioner has not brought him here, but that he is served with the petition at his own instance.

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Ex parte  
Wood.

Sir JOHN CROSS thought that the bankrupt's executor ought to have been served with the petition.

*Note.* It was then arranged, that copies of the affidavits in support of the petition should be furnished to Mr. *Russell's* client, and that he should be heard in opposition, before judgment was pronounced. The hearing of the petition then proceeded.

Mr. *Saunders*, for the separate creditors. The 62nd section expressly declares that the joint creditors shall not receive any dividends out of the separate estate, until all the separate creditors shall have received the full amount of their respective debts; and then the 132nd section prohibits the assignees from paying the surplus to the bankrupt, until all the creditors shall have received interest upon their debts. Now, in *Ex parte Reeve* (a), Lord *Eldon* says that the interest is as much a debt due from the bankrupt, as the principal. If this be so, then it is clear that the joint creditors have no right to any dividend, until the separate creditors have received the full amount of principal and interest on their debts. [Sir *John Cross*. If Lord *Eldon* alluded to interest payable by contract on debts, then the observation

(a) 9 Ves. 590.

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applies; but here the interest is only given by the act of parliament, and not by contract.] The distinction of this case from those which have been cited is, that it is a separate fiat; all the other cases have been under joint commissions or fiats. The assignees under a separate fiat have no power over the joint estate. Suppose a dividend under the separate estate is, for some cause or other, delayed for four years, when it is sufficient to pay 21s. in the pound. This small surplus would not be enough to satisfy the separate creditors interest on their respective debts, and it would be most unjust that any portion of it should go to the joint creditors, until the separate creditors have received interest on their debts.

Sir JOHN CROSS.—As it is a new question, and one of some nicety, and the Court has consented to hear counsel on behalf of the bankrupt on a future day, I shall for the present forbear expressing my opinion.

*Cur. adv. vult.*

July 28.

Mr. *J. Russell*, and Mr. *Rolt*, appeared on this day to argue the case on behalf of the personal representative of the bankrupt.

Mr. *Swanston*, and Mr. *Anderdon*, for the petitioner, objected to their being heard, unless their client would submit to be bound by any Order which the Court might make.

Mr. *J. Russell*, and Mr. *Rolt*, declined entering into any agreement on the subject, but insisted on their right to be heard.

Sir JOHN CROSS held, that by appearing, the executor, in effect, submitted to the jurisdiction of the Court.

Mr. *Swanston*, and Mr. *Anderdon*, then re-opened the case. *Ex parte Marston* (a) decides that the remedies provided by 7 Geo. 4. c. 46., in the case of joint stock banking companies, are given in addition to and are not substituted for the remedies available in ordinary cases. The same point was decided in *Ex parte Wood* (b). The usual rule for the administration of assets in the case of partnerships is therefore applicable, according to which the surplus of the separate estate, after paying the separate debts in full, is to be distributed amongst the joint creditors, pursuant to the directions of the 6 Geo. 4. c. 16. s. 62. At all events, their right to such distribution cannot be disputed in this Court by the personal representatives of the bankrupt, over whom the Court has no jurisdiction, and who intervene gratuitously, without having been served. And they cited *Devaynes v. Noble* (c), *Ex parte Chandler* (d), *Ex parte Holmes* (e), and *Ex parte Taitt* (f).

1841.

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Ex parte
Wood.

Mr. *J. Russell*, and Mr. *Rolt*, for the personal representative of the bankrupt. We admit, that, where there is no solvent partner, and where the joint estate has been fully administered, a joint creditor may take a dividend out of the separate estate; but how can that rule apply to the present case, where there are many solvent partners, and where the joint estate has not been administered, but is in the course of administration in the Court of Chancery? It is clear, that the joint estate must first be exhausted. [Sir *John Cross*. That might be so, if the joint estate were in the course of administration in bankruptcy.] Whether it is actually in the course of

(a) Mont. & Ch. 576.

(b) 1 M. D. & D. 92.

(c) 2 Russ. & My. 495, and see *Thorpe v. Jackson*, 2 Y. & C. 553.

(d) 9 Ves. 35.

(e) 2 Ro. 95.

(f) 16 Ves. 193.

1841.

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administration in bankruptcy, or not, it is the duty of the joint creditor to have it administered, before he resorts to the separate estate. Such would have been the terms imposed upon him by a court of equity, if Mr. *Webster* had died, without a fiat having issued against him, and a creditors' suit had been instituted for the administration of his estate. With regard to the 6 *Geo.* 4. c. 16. s. 62.,—the enactment relied upon is a negative one, merely, providing that the proof of the joint creditor against the separate estate shall not entitle him to dividends, until the separate creditors have been paid in full. It was not thereby intended to give him any greater right to dividends out of the separate estate than he had before, but was introduced for the purpose of settling the practice which had previously fluctuated; Lord *Hardwicke* and Lord *Thurlow* acting upon one rule, and Lord *Rosslyn* and Lord *Eldon* upon another. And they cited *Everett v. Backhouse* (a); and *Dutton v. Morrison* (b).

Mr. *Swanston* having replied, judgment was deferred.

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Sir JOHN CROSS.—In this case the bankrupt was a partner in a banking company established at Manchester, pursuant to the act for regulating co-partnerships of bankers (7 *Geo.* 4. c. 46.), and he was made a bankrupt by one of the creditors of the company, which had previously failed, owing debts to a large amount. The assignees have paid all the separate creditors of the bankrupt 20s. in the pound, and they have a surplus in their hands amounting to 6000*l.* applicable to the payment of the joint creditors, if they are entitled thereto. And the petitioner, on behalf of himself and the rest of the creditors of the bank, has applied for an Order for that purpose.

(a) 10 Ves. 97.

(b) 17 Ves. 206.

At a meeting of the Commissioners held for auditing the assignees' account, and declaring a further dividend, the representatives of the bankrupt then deceased, opposed the distribution of the fund, alleging that the affairs of the banking company were the subject of a suit then depending in the Court of Chancery, and that it was not competent for the Commissioners to interfere with the surplus fund, after payment of the separate creditors; and, on the part of the separate creditors, a claim was made for interest on their respective debts, prior to the payment of the joint debts. The assignees objected to the competence of the Commissioners to interfere, without obtaining an Order of this Court. Whereupon the Commissioners adjourned the meeting for that purpose.

The case has been argued by counsel for the assignees, for the joint and for the separate creditors, and for the representatives of the bankrupt; and I have fully considered the claims and objections of these several parties. As to the question whether the joint creditors are entitled to dividends, before any interest is paid to the separate creditors, —I think the 62nd section of the general act entitles the creditors of the bank to such previous payment; it being there enacted, "That such (joint) creditors shall not receive any dividend out of the separate estate, until all the separate creditors shall receive the full amount of their respective debts," saying nothing of any interest on those debts. And I find no mention of such interest in the act, except in the 132nd section, where it is enacted, "that the assignee shall not pay the surplus to the bankrupt, until all the creditors who have proved under the commission shall have received interest upon their debts, to be calculated as there mentioned." Before the passing of that act, which has made some verbal alterations in the former, but none I think material to this question, I find

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in *Reeve's case*, reported in 9 Ves., Lord *Eldon* said, "It is now clearly settled, that where the separate creditors are paid 20s. in the pound, and there is a surplus, it shall not go immediately to pay interest to separate creditors, but shall make the joint equal to them as to principal."

As to the objection on the part of the bankrupt's personal representatives, I think the existence of the chancery suit cannot defeat, and ought not to suspend, the right of the joint creditors to the dividends now claimed; and I think the petitioner is entitled to an Order as prayed.

Mr. *J. Russell* then applied for the costs of the bankrupt's personal representatives to be paid out of the estate, which was refused by the Court.

ORDER as prayed; costs of the other parties out of the estate.

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An official assignee, who is removed, has no right to retain the papers belonging to the bankrupt's estate in his hands, until he is remunerated for his services under the fiat; and if he refuse to hand them over to his successor, he will be ordered to deliver them up, with costs.

Ex parte GEORGE JOHN GRAHAM.—In the matter of
ISAAC HENRY ROBERT MOTT.—

THIS was the petition of an official assignee, who had been appointed in the room of one removed by an Order of this Court, praying that the removed assignee might be ordered to deliver up to the petitioner certain documents and papers belonging to the bankrupt's estate. The Order for the removal of Mr. *James Clark*, the late official assignee, was dated the 20th April last; since which period, it appeared from the affidavits in support of the petition, repeated applications had been made by

the petitioner to *Clark* for the documents ; all of which had been met either by refusal or evasion.

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Mr. *Swanston*, and Mr. *Anderdon*, in support of the petition. The petitioner in this case was duly appointed by the Commissioner, within the provisions of the Bankruptcy Court act, 1 & 2 Will. 4. c. 56. s. 24., which enables the Court of Bankruptcy, in case of the removal of any official assignee, to appoint another in his room.

Mr. *J. Russell*, and Mr. *Glasse*, *contrà*. This is an extraordinary application made by an official assignee, without the concurrence of the creditors' assignee. Mr. *Clark* has a large claim for remuneration for his services as official assignee in this bankruptcy ; for every thing was arranged by him and brought up to the period of making a dividend in this bankruptcy. His remuneration would, if he had been continued, have been then ordered by the Commissioner ; but he is not the less entitled to remuneration, because his removal took place before the dividend was declared. The matter therefore is for the jurisdiction of the Commissioner, and not for this Court. At any rate, it ought to go before the Commissioner, in the first instance ; which is the proper jurisdiction to decide, if any and what remuneration ought to be paid to Mr. *Clark*. The petitioner has been allowed free access to all the documents ; no obstacle or hindrance has been interposed ; and Mr. *Clark* only asked, that the act of remuneration to which he was entitled should be ascertained, before he parted with the documents in question. If the papers were at once given up by him, he might be unable to do himself justice in respect of the amount of remuneration claimed by him. The demand made on

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Clark by the petitioner was, not to deliver up the books and papers to the assignee, but to one *Pike*, who was clerk to the solicitor for the petitioner. There is great doubt, whether this Court has jurisdiction in the matter; as a removed assignee, *Clark* is a stranger to the estate; and it is questionable, whether the Court has power to order him to deliver up the papers, unless he came to the Court to claim some allowance.

Mr. *Swanston*, in reply, was stopped by the Court.

Sir JOHN CROSS.—I feel sorry that it has been necessary to bring a case of this kind before the Court; as the discussion may tend to cast discredit on a most useful body of men, the official assignees, who are generally persons of great intelligence and respectability. In the present instance, it appears that Mr. *Clark* was one of the original official assignees appointed for the purpose of distributing more beneficially the estates and effects of bankrupts. By virtue of his office, he had the affairs of from 100 to 200 estates in his hands; when suddenly, without warning, and without winding up his accounts, he resigned his situation and left all in confusion, retaining possession of important papers and documents, and obstinately refusing to give them up to the person appointed to succeed him in his office. Every thing therefore must stand still, if he is permitted to withhold these papers from the proper custody of the petitioner. It appears that repeated applications have been made to Mr. *Clark* for the papers; and, after a long correspondence on the subject, a formal notice was served on his clerk. Messages from the Commissioner were sent to him, but not attended to; and I only regret that more stringent

measures have not been resorted to, and that the Commissioner's summons was not followed up by a warrant and commitment to prison. It is alleged in the petition, that personal service of the Commissioner's summons was evaded,—that *Clark* purposely kept out of the way,—that he still retains the papers on various pretences,—and that the present application to the Court became necessary in order to enforce their delivery. These are the circumstances stated in the petition. How is this met on the part of *Clark*? As an officer of the Court desirous of doing his duty? No—he has now instructed his counsel to say, that he is ready to deliver up the books, if the Commissioner should think fit,—in order to evade the present application to this Court, and after urging every possible objection as to the form of the proceeding, and denying the jurisdiction of this Court. I shall say little on the subject of jurisdiction, except that there is no doubt that the Court possesses the jurisdiction, and is resolved to exercise it. Mr. *Clark* does not deny a word of the charge against him in the petition; but, in an affidavit exceeding twenty sheets in length, he promises to do every thing that is right, but in reality does nothing. He proposes to retain the papers in this bankruptcy, until he shall have made up the whole of his accounts relating to this as well as other estates—a proposition perfectly monstrous. He insists on his right of retention, until remuneration shall be awarded to him for his services. He has no such right. It is true, that the law allows the Commissioner to award him a reasonable remuneration for his services, and he may have some claims on this score; but I hope that the Commissioner, in estimating the value of these services, will not forget the service he has rendered to day in putting the estate to the

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expense of resisting this petition. The Order must be, that *Clark*, within a week from the present date, do deliver up, on oath, to the petitioner all accounts, books and papers relating to this bankrupt's estate, and do also pay all the costs incurred in this petition.

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Ex parte WILLIAM MILES THOMAS.—In the matter of JAMES WALTER THOMAS and SARAH THOMAS.

The goodwill of the bankrupt's trade, so far as it is local, passes to his assignees.

Two of the next of kin of an innkeeper, who dies intestate, carry on the business in their own names, and pay some of the intestate's debts, but do not take out administration to her estate. They afterwards become bankrupt, and then another of the next of kin takes out administration. *Held*, that the stock in trade and fixtures belonged to the administrator, and did not pass to the assignees under the 72nd section; the case of *For v. Fisher* (a) not establishing generally, that effects in a bankrupt's hands, as an executor *de son tort*, are within the operation of that section.

THE question in this case was, whether the assignees were entitled to retain the proceeds of the stock in trade, fixtures and goodwill of an hotel at Bristol, which they had sold as part of the property of the bankrupts; or whether they ought to pay over those proceeds to the petitioner, who was the brother of the bankrupts, and who, having taken out letters of administration to their mother, claimed the proceeds in question, on the ground that the goodwill, stock in trade and fixtures formed part of her estate. The title to the property was not clearly made out in the petition or affidavits; but it appeared that the father of the bankrupts had carried on the business up to his death, holding the premises under a lease, which was determinable upon bankruptcy. It also appeared, that upon his death, his son, the bankrupt *J. W. Thomas*, who was his executor and had proved the will, carried on the business for some time, and then gave it up to the petitioner, who afterwards relinquished it to the testator's widow, by whom, with the assistance of her daughter (the other bankrupt), it was conducted until the year 1838, when the widow died intestate. From that time the business had been carried

(a) 3 B. & Ald. 135.

on by the two bankrupts, their names appearing over the door of the inn, and they having the complete control and disposition of the property. No letters of administration were taken out to the intestate's estate, till after the date of the fiat; but the bankrupts paid some of her debts. In October 1840 the fiat issued, whereupon the lease was determined; and the assignees proceeded to sell the property now in question. The petitioner, having after the date of the fiat taken out letters of administration, now prayed by this petition, that the assignees might be directed to account for and pay over to him the value of the property and effects belonging to the intestate, in the petition mentioned to have been received and sold by them, together with the sum of 250*l.*, or such other sum as should appear to have been produced by the sale of the goodwill of the business of the hotel.

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Mr. *Swanston*, and Mr. *Osborne*, for the petition. First, as to the proceeds of the goodwill,—they clearly do not belong to the assignees; goodwill being a description of property which from its nature is incapable of passing to the assignees. *Farr v. Pearce* (a).

The COURT having directed the question respecting the goodwill to be argued separately,

Mr. *J. Russell*, and Mr. *Bacon*, for the assignees, contended that the authority of *Farr v. Pearce* did not apply; as the decision there was expressly grounded on the circumstance, that the business in that case was that of a surgeon; which circumstance was considered, as distinguishing the case from one relating to a mere commercial speculation.

(a) 3 Mad. 74, and see *Crutwell v. Lye*, 17 Ves. 335.

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Mr. *Swanston*, in reply.

Sir JOHN CROSS.—I am not aware of any case in bankruptcy, on which a question has arisen respecting the commodity called goodwill; and yet, according to the present argument, there must exist such a commodity in every bankruptcy. It is easy to conceive there to be such a thing as local goodwill, arising from the habit which customers have been in of frequenting the same place. There is another kind of goodwill which may be called personal, and this has been said to be incapable of sale (a). But there may be a goodwill, like that in the present case, which is partly personal and partly local. This, so far as it was personal, remained with the bankrupts, notwithstanding their bankruptcy, and did not pass to the assignees; for it is nothing else than the power to recommend the customers of the old concern to the new one, a power which cannot be exercised by assignees. So far therefore as this goodwill is personal, it does not appear to me to belong to either of the parties now before me. It is a matter of ordinary occurrence, that where a publican has premises for the residue of a term, he can sell the goodwill; for he can decline to give up the possession, unless upon receiving a premium. But I am of opinion, that under the peculiar circumstance of this case, no such thing as goodwill can be considered as having been sold by the assignees, there being in fact no such commodity to sell. Counsel may therefore address themselves to the rest of the case.

Mr. *Swanston*, and Mr. *Osborne*, for the petition. The property in question must be regarded as that of the

(a) See Lord Eldon's observation in *Crutwell v. Lye*, 17 Ves. 335; 1 Rose, 123, and see further 1 Deac. B. L. 388.

intestate; the title of the bankrupts, and consequently that of the assignees, being derived entirely from her. They cannot dispute her title, nor set up any other paramount to hers, but must admit the true ownership to have been in the intestate; and, even if it were admitted that the property was in the order and disposition of the bankrupts at the time of the bankruptcy, still that circumstance would not entitle the assignees to it, for two reasons: first, that the possession of the bankrupts was of a fiduciary character, they having taken upon themselves the office of personal representatives; and secondly, that from the death of the intestate to the present time, there has been no one filling the character of true owner; and, consequently, the other requisite for the purpose of bringing the case within the 72nd section, namely, the consent of the true owner, is wanting.

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Mr. *J. Russell*, and Mr. *Bacon*, for the assignees. The property having after the death of the father passed through the possession, first of one son, and then of another, and then of the intestate, has ever since her death been in the order and disposition of the bankrupts; and granting, as is contended on the other side, that the intestate was the true owner, the case of *Fox v. Fisher* (a) establishes conclusively, that there is no such want of consent of a true owner here, as to prevent the property passing to the assignees under the 72nd section. In that case *Bailey J.* said, "If we were to hold that a possession of this sort could be defeated by administration subsequently taken out, we should make an end of the statute of *James*. The possession here would naturally induce the creditor to suppose that the goods were the bankrupt's property, and that he had (if necessary) taken

(a) 3 B. & Ald. 135.

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out letters of administration, as he was entitled to do. There are cases which show, that where an executor uses goods of the testator as his own, those goods may be seized under an execution against the executor. Here the bankrupt had for nearly twelve years possession of these goods, with the consent of all who were entitled to dispute it with him, and that is enough to satisfy the words of the statute." The only difference between the present case, and the case of *Fox v. Fisher* (a), is this ; that a longer interval had there occurred between the death of the intestate and the date of the fiat ; but that circumstance can make no difference, the principle of the decision in *Fox v. Fisher* being, that any person claiming under the intestate, even a creditor, might have taken out administration, if he wished to prevent the estate from passing under a fiat ; and that if all persons so interested stand by and do not interfere, they must be held to consent to the possession. [Sir J. Cross. Can it be said, that the administrator becomes the true owner by relation to the time of the death ?] Whether that technical expression be given to the rule or not, the rule itself is fully borne out by the reasons we have stated. With regard to the argument founded on the notion of the bankrupt's possession being of a fiduciary character, it is to be observed, that the bankrupts were carrying on the business of the intestate, which they had no right to do, as administrators, or in a fiduciary character. They could only have done so, as owners of the property ; and all those interested in the assets, including the petitioner, permitted them to be dealt with in this mode. If the Court went beyond the reputed ownership, and looked for the legal title to the property, it is not shown to be in the petitioner ; nor are

(a) 3 B. & Ald. 135.

there materials before the Court for deciding upon the question.

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Mr. *Swanston*, in reply. The case is distinguishable from *Fox v. Fisher*; in the first place, as regards the length of the interval between the death of the intestate and the fiat, upon which the Court in *Fox v. Fisher* (a) relied very much. In the next place, the bankrupts, by paying debts of the intestate, became executors *de leur tort*, and therefore took upon themselves to act as trustees. If all their acts were not wholly consistent with the character of trustees, that circumstance is immaterial, and cannot improve their situation or that of those claiming under them. In *Fox v. Fisher* there had been no payment of debts, and no assumption of the character of personal representative; and even if the cases were more nearly alike, it must be remembered that *Fox v. Fisher* was decided by a court of law, which cannot take into consideration the equitable rights of the parties. That authority, therefore, would not necessarily bind this Court, which is one of equity, as well as law.

Cur. adv. vult.

Sir JOHN CROSS.—In this case, the petitioner is the sole administrator of the effects of his mother, *Susan Thomas*, who kept a hotel at Bristol, and died in the occupation thereof, leaving her house, furniture and stock in trade in the possession of her daughter, one of the bankrupts, who was then residing with and assisting her mother in carrying on the business. The other bankrupt then went to reside with his sister, and they jointly continued in the occupation of the premises and

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(a) 3 Barn. & Ald. 135.

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effects, and carried on the business as before in all respects,—and acted as the legal representatives of the intestate, but without having taken out any letters of administration,—up to the time of the bankruptcy; except that the sister had retired shortly before, leaving the other bankrupt in the sole possession. The assignees have succeeded to the possession, and have sold furniture and effects left by the intestate to the amount it is alleged of 1000*l.* and upwards, which they claim to be entitled to by virtue of the statute, as being in the order and disposition of the bankrupt, *James Thomas*, at the time of his bankruptcy. The intestate left three sons and a daughter; and her son *William*, the petitioner, has since the bankruptcy taken out letters of administration, and become her sole legal representative. Now if the bankrupt had obtained such administration before his failure, these effects would have been clearly trust property in his hands, and as such not liable to be administered amongst his creditors; and I think they were subject to all the same equities, though he was dealing with them as her executor *de son tort*, and that it is so in the hands of the assignees. I am therefore of opinion, that the petitioner is entitled to call upon the assignees to account with him for the produce of the effects of the intestate which have come to their hands, and have been sold by them; and that, in taking such account, the assignees are entitled to set off any debts of the intestate, which the bankrupts may have paid beyond the value of her stock in trade disposed of by them to their own use, and of monies of the intestate received by them. And until such account be taken, let the rest of the matters of this petition stand for further directions, except as to a sum claimed from the assignees for the goodwill of the hotel;

as to which the petition is dismissed, the petitioner not having made out any title to such claim. I was much pressed in the argument of this case, by the case of *Fox v. Fisher*; but I think, though it bears in some respects a resemblance to the present case, the Court did not then intend to lay down a general rule, that in all cases where a bankrupt had in his hands at the time of his failure any effects as executor *de son tort*, they were within the meaning of the statute, and distributable among the creditors of the bankrupt.

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The ORDER was, that the assignees should come to an account with the petitioner, as administrator of the intestate, for the value of the furniture and effects of which she died possessed, and which at her decease came into the possession of the bankrupts, or either of them, and which had been since sold by the assignees; and, in taking such account, the assignees were to have credit for all debts of the intestate paid by the bankrupts, or either of them, since her decease, exceeding the value of the stock in trade sold or disposed of by the bankrupts; and the assignees were to account to the petitioner for any property of the intestate received by the bankrupts since her decease, and that had come to the hands of the assignees; and as to the goodwill, the Court made no order. Further directions and costs were reserved.

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Where the bankrupt, who was a director of a joint stock company, mortgaged his shares to secure an advance of money, but stipulated that no notice should be given of the transaction to the company, not wishing it to be known to his brother directors, and the mortgagee acceded to this stipulation, the shares were held to be in the order and disposition of the bankrupt within the meaning of the 6 Geo. 4. c. 16. s. 72.

Ex parte JOHN GEORGE NUTTING, and another.—In the matter of THOMAS HAMLET.—

THIS was the petition of a creditor claiming a lien, as mortgagee, on sundry shares held by the bankrupt in the "General Steam Navigation Company," "The British Gas Light Company," and "The Columbian Mining Association," of which companies the bankrupt was also an acting director.

The petition stated, that by indenture, dated the 9th September 1836, between the bankrupt of the one part, and *John Crossley*, deceased, of the other part, reciting that the bankrupt had applied to *Crossley* to lend him the sum of £300*l.*, and that for securing the repayment thereof the bankrupt had given his bond for the payment of this sum, bearing even date with the indenture; it was witnessed, that in consideration of the sum of £300*l.* paid by *Crossley* to the bankrupt, the bankrupt did thereby bargain, sell, assign, transfer, and set over unto the said *John Crossley*, his executors, administrators, and assigns the several shares therein particularly mentioned and specified, the particulars whereof were mentioned or specified in the schedule thereunder written; together with the full benefit and advantage to be had and derived from the said shares, and all dividends, bonuses, and other profits or proceeds then and thenceforth to grow due upon and in respect of the same; and all the right, title, &c., together with all powers, remedies, and means whatsoever requisite or necessary for recovering, receiving, and giving effectual receipts, releases, and discharges for the monies to become due or payable under or by virtue of the said several shares; to hold, receive, and take the same unto the said *John Crossley*, his executors,

administrators, and assigns, absolutely, subject nevertheless to redemption as therein mentioned. And the bankrupt did thereby covenant and agree, whenever thereto required by the said *John Crossley*, his executors, administrators, or assigns, to transfer or procure the said several shares to be transferred into the name or names of him the said *John Crossley*, his executors, administrators, or assigns in the transfer books of the said several companies respectively; subject nevertheless to redemption, on payment to the said *John Crossley*, his executors, administrators, or assigns of 2300*l.* on the 9th November then next, with interest at five per cent. per annum.

At the time of the execution of this indenture, the several certificates under the hands of the directors of the above-mentioned companies, entitling the bankrupt to the said several shares, were delivered by him to *Crossley*; and the same remained in his possession up to the time of his decease, and had ever since been and were then in the possession of the petitioners, as his executors. No formal notice was given to either of the companies of the indenture of assignment, or the delivery of the certificates; and the petitioners contended that none such was necessary, as the bankrupt was an acting director in each of the several companies.

Crossley died on the 31st December 1840, leaving the petitioners his executors.

The bankrupt duly paid the interest, which became due from time to time upon the debt of 2300*l.*, up to the 9th September 1840; but, at the period of his bankruptcy, the whole of the principal with an arrear of interest was due from him.

The petitioners had applied to prove for the amount of the principal and interest due; but their application

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was opposed on the part of the assignees, who insisted that they were entitled to the several shares as part of the bankrupt's estate, and called upon the petitioners to deliver over to them the several share certificates, before any proof for the debt was admitted, on the ground that no sufficient notice had been given to the several companies of the execution of the indenture of assignment; and, on the petitioners refusing to comply with this requisition, the proof was rejected.

The assignees had since given notice in writing to the petitioners, requiring them to deliver up the certificates, and had also threatened to bring an action of trover for them against the petitioners.

The prayer was, that the petitioners might be declared to be entitled to the several shares by virtue of the indenture of assignment, and for the usual reference to the Commissioners to take an account of what was due to the petitioners for principal and interest up to the date of the fiat; that the shares might be sold to satisfy the amount of what should be so found due, and that the petitioners might prove for the residue which the proceeds of the sale were insufficient to discharge; and that in the meantime the assignees might be restrained from commencing any action at law, or other proceedings, against the petitioners for recovering the share certificates.

In answer to the allegations in the petition, it was sworn by the bankrupt, that at the time of the execution of the indenture there was an express stipulation between him and *Crossley*, that the latter should not give any notice to the companies of the assignment of the several shares; as the bankrupt, being a director of the several companies, did not wish it to be known to his brother directors that he had assigned his shares; and

there was moreover a bye law of the several companies, that no shares should be assigned or transferred, without leave of the directors. The bankrupt also swore, that the interest stipulated to be given was 10*l.* per cent., and not 5*l.* per cent., as stated in the deed; and one receipt from *Crossley* for interest at 10*l.* per cent. was proved to have been given to the bankrupt. The bankrupt's affidavit was contradicted, as to the usurious interest; but there was no contradiction, as to the stipulation of *Crossley* not to give notice to the directors of the assignment of the shares.

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Mr. *Swanston*, in support of the petition, relied on the case of *Duncan v. Chamberlayne* (a), where the Vice-Chancellor of England held that a party, who had effected a policy of assurance with a mutual assurance company, was to be considered a partner in the company, and therefore that no formal notice was necessary to be given to the company of the deposit of the policy with a third person; as notice to one partner was an implied notice to all. [Sir *John Cross*. There is this peculiarity in the present case, that it was expressly agreed that *Hamlet* should continue to be the reputed owner.] That agreement by *Crossley* to dispense with giving express notice, cannot detract from the effect of what the law considers as implied notice. If constructive notice is sufficient, without express notice, then the stipulation of *Hamlet*, that express notice should not be given, is not to prejudice the title of the petitioners, which would have been good, without any express notice. If their title would have been good, founded on an implied notice, then express notice would have been an useless ceremony; for,

(a) 11 Sim. 123.

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in contemplation of law, implied notice is as effectual as express notice. The transaction itself, on the authority of the case before the Vice-Chancellor, involved notice to the co-partners of the bankrupt in the insurance office. Could the bankrupt therefore continue reputed owner of the shares, when the change of ownership was known to his copartners? On the other part of the case, namely, the defence set up on the ground that there was a stipulation for interest at 10*l.* per cent.,—the bankrupt contradicts his own deed, which expressly provides that interest shall be paid at the rate of 5*l.* per cent. per annum; and he waits to set up this defence, until the other party to the deed is dead. Moreover, from the year 1836 to the present time, he only produces one solitary receipt from *Crossley*, which happens to fit his oath. To contradict the provisions of the deed in this respect, there ought to have been a series of documents in evidence, which the bankrupt has failed to produce.

Mr. *J. Russell*, for the assignees, was stopped by the Court.

Sir JOHN CROSS.—If the facts stated in *Hamlet's* affidavit had depended upon his sole testimony, I should have been cautious in acting upon his evidence; as he is an interested witness, and his affidavit has been in part contradicted. But then it has been also partially confirmed by the evidence adduced by the petitioner. For in the affidavit of Mr. *Whickham*, a professional man, which is made in reply to the bankrupt's affidavit, although he swears that he was privy to the transaction between *Crossley* and the bankrupt, and that only 5*l.* per cent. interest was to be given, yet he does not venture

to deny that there was a private stipulation agreed to on the part of *Crossley*, not to give express notice of the assignment of the shares to the insurance companies. Now, if it was concerted between the parties to make the transfer of the shares secret, it was emphatically a case within the meaning of the 72nd section of the bankrupt act; and the effect of the arrangement, as it seems to me, was to give the original owner of the shares the order and disposition of them for certain purposes, and this, too, by a special contrivance with the true owner. I am of opinion, therefore, that the bankrupt continued reputed owner of the shares in question, and that they were in his order and disposition, with the consent of the true owner, at the period of his bankruptcy, within the meaning of the 72nd section.

Mr. *Swanston*. The shares of one of the companies which were assigned were in the *Columbian Mining Association*; the very object of which imports a *freehold* interest in the shareholders; and no notice of any conveyance or transfer of interest is necessary, in the case of freehold property.

Sir JOHN CROSS.—The Court cannot infer a freehold interest in these shares, from the mere *name* of the company.

Petition dismissed, with costs.

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Hall,  
July 22.*

Where a plaintiff obtained a decree against the defendant, referring it to the Master to take an account of what was due to the plaintiff, and that what the Master should so find to be due should be paid to the plaintiff, with costs to be taxed by the Master; and the Master did not make his report, until after a fiat had issued against the defendant; *Held*, that the decree was not final, and therefore the plaintiff was not entitled to prove for the amount of the debt and costs found due by the Master's report.

A petition to stay a certificate should not be presented, until the certificate is signed by the Commissioners, and is taken into the office for allowance.

Ex parte JOHN GREEN CROSSE.—In the matter of  
SUSAN BEDINGFIELD.—

**THIS** was a petition of the executor of a creditor to prove the amount of a debt under a decree of the Court of Chancery.

The bankrupt, as surety for her son *James Bedingfield*, on the 31st August 1822, entered with him into a joint and several bond to one *Thomas Bayley*, for the payment by *James Bedingfield* to *Bayley* of an annuity of 50*l.* for the life of *Bayley*, by half yearly payments on the 11th November, and the 11th May, in every year. A memorial of the bond was duly inrolled in the Court of Chancery. *James Bedingfield* paid the annuity up to the 11th November 1824, but no longer. *Thomas Bayley* died on the 11th March 1834, leaving the petitioner his executor, who filed a bill in Chancery against *James Bedingfield* and the bankrupt, to recover the arrears of the annuity from the 11th November 1824 to the death of *Bayley*. By a decree of the Vice Chancellor of England made in this cause, dated the 2nd March 1841, it was ordered that it should be referred to the Master to take an account of the arrears of the annuity from the 11th November 1824 to the 11th March 1834, such arrears not to exceed in the whole the sum of 500*l.*, being the amount of the penalty of the bond; and that what the Master should certify to be due on the said annuity should be paid to the petitioner by *James Bedingfield* and the bankrupt; and that the Master should tax the petitioner his costs, and that the costs when so taxed should be paid by *James Bedingfield* and the bankrupts.

On the 3rd May 1841, the Master made his report,

by which he found that the sum of 466*l.* 13*s.* 4*d.* remained due on account of the arrears of the annuity, and that he had taxed the plaintiff's costs at the sum of 253*l.* 3*s.*

1841.

Ex parte  
Crosse.

The fiat was issued on the 2nd April 1841.

On the 28th May the petitioner applied to prove the amount of his debt established by the decree and the Master's report; but the Commissioners rejected the proof, on the ground that the report had not been confirmed; and allowed a claim only to be entered on the proceedings for the sum of 719*l.* 16*s.* 4*d.* They also refused to stay the bankrupt's certificate, although, as the petition alleged, the amount of his debt would have turned the certificate.

The petitioner contended, that by the decree of the Vice Chancellor, the debt became equivalent to a judgment debt, and that the Master's report did not, according to the practice of the Court of Chancery, require confirmation.

The prayer was, that the claim might be directed to be entered as a proof on the proceedings, and that in the mean time the allowance of the bankrupt's certificate might be stayed.

Mr. *Koe*, in support of the petition. A decree to pay a sum of money is, in all respects, equal in force to a judgment at law; and we contend, that the decree in the present instance was a final decree; for it directs absolutely the payment to the petitioner of what the Master should find to be due from *James Bedingfield* and the bankrupt. There is no pretence for saying that this report requires confirmation. The Court declared that what was due on the bond was a debt due from the bankrupt to the petitioner, the amount of which only was

1841.

Ex parte  
CROSS.

to be ascertained by the Master, and that whatever the Master reported to be due should be paid by the bankrupt. [Sir John Cross. Can this Court make any order not to allow a certificate, when the petition contains no averment that the Commissioners have signed it? Without the signatures of the Commissioners, it is in all respects a non-existing certificate.] Since the petition was presented, the Commissioners have signed the certificate, and it is now with the proceedings in Court. The Court may look at the proceedings, to see whether the fact is so. [Sir John Cross. Upon referring to the proceedings, it certainly does now appear that the certificate has come into the office, and has already been stayed until the hearing of this petition.] It is expressly alleged also in the petition, that if the petitioner had been admitted to prove, the effect would have been to turn the certificate.

Mr. *Swanston*, for the bankrupt, referred to *Ex parte Groome(a)*, where Lord *Eldon* said, that he was strongly inclined to think that a prospective petition to stay a certificate could not be supported.

The assignees did not appear.

Mr. *Koe*, in reply. The case of *Ex parte Groome* has no application to the present. The only point decided there was, that the bankrupt ought to have been personally served with the petition to stay the certificate; and the Lord Chancellor merely alluded to a prospective petition to stay a certificate, before the bankrupt had passed his last examination.

Sir JOHN CROSS.—The Court would not make any

(a) Buck, 39.

## CASES IN BANKRUPTCY.

order to stay the certificate, without a petition in the usual form, which ought not to be presented until the certificate is signed by the Commissioners, and taken into the office for allowance. Staying the allowance of a certificate is a case *strictissimi juris*, and in such a proceeding parties are always held strictly to matters of form. The opposing creditor states in his petition, that he was wronged by the Commissioners refusing to stay the certificate; but one of the chief grounds for the creditor coming to this Court is, that the Commissioners have signed the certificate; a petition previously presented being premature. If any improper proceeding had been alleged on the part of the bankrupt, the case would have been different; but nothing of the kind appears. Then, as to the debt, the question is, whether the two sums for debt and costs, as specified in the decree, are proveable. It is settled, that a judgment must be entered up, before it can be admitted to proof under a fiat in bankruptcy; and it is clearly established by *Walker v. Barnes* (a), and *Haswell v. Thorogood* (b), that where judgment is not signed until after the bankruptcy of the party against whom it is obtained, neither the debt, nor the costs, are proveable. I admit that a decree of a Court of equity is equal in force to a judgment at law, provided the decree is final. But the question is here, whether the decree of the Vice Chancellor, referring it to the Master to take an account of the arrears of the annuity, is to be considered final, or only interlocutory. I am of opinion, that the decree must be considered only interlocutory; as a question of computation was to be settled, before the decree could have any effect; and moreover, before a decree can be considered final, it must be signed

1841.

Ex parte  
Crossk.

(a) 5 Taunt. 778.

(b) 7 B. & C. 706.



1841.

Ex parte  
CROSSE.

by the judge in equity, and be inrolled. Whether the petitioner has not a proveable debt on the bond, independently of the decree, to the amount of 466*l.* 13*s.* 4*d.*, is another question, which is not now before the Court.

Petition dismissed, as against the bankrupt, with costs, and certificate to be allowed.

Serjeants' Inn  
Hall,  
July 26.

A joint and separate creditor, who has proved against the joint estate, not permitted, without special grounds, to retire from his proof and prove against the separate estate.

Ex parte ROBERT DIXON.—In the matter of JAMES ROBINSON.

THIS was a petition to transfer a proof, which had been made against the joint estate of *James Robinson* and *William Cooper Robinson*, to the separate estate of the former.

The bankrupt and *W. C. Robinson* carried on business in partnership as scriveners at Hull, and the petitioner had in July 1839 entrusted them with the sum of 500*l.*, to be invested for him at interest; but, in November 1840, no investment having been made, the bankrupt, *James Robinson*, signed in the name of himself and his partner, and delivered to the petitioner, a promissory note to the following effect:

“Hull, November 10th 1840.

“We jointly or severally promise to pay to Mr. *Robert Dixon*, or order, the sum of 500*l.*, with interest thereon at 4*l.* per cent. per annum, for value received.

*J. and W. Robinson.*”

At the same time, he signed and delivered to the petitioner a memorandum to the effect that interest was payable on the sum of 500*l.* from July 13th 1839.

The petition stated, that the petitioner being advised

that he was at liberty, and that it would be for his benefit, to prove the debt against the joint estate, he had proved it against such joint estate accordingly; but that he was now desirous of retracting his proof, and of proving the debt against the separate estate of *James Robinson*.

1841.

Ex parte  
DIXON.

Mr. *Bacon*, for the petition. The petitioner has a right of proof against the separate estate; the very terms of the instrument amounting to an acknowledgment of a separate liability; and a party, who is both a joint and separate creditor, is not concluded by proving against the joint estate, but may, even after the declaration of a dividend, retire from that proof, and prove against the separate estate; *Ex parte Husband* (a), *Ex parte Bolton* (b), *Ex parte Law* (c).

Mr. *Swanston*, for the assignees, was not called upon to address the Court.

Sir JOHN CROSS.—The petitioner gives no reason for his changing his mind. He states, that he was advised to prove against the joint estate; but he does not suggest, that he has discovered anything which has led him to alter his determination. It is very doubtful how far it is just to other creditors, to permit a party, who has made a proof against a certain estate, to prove against a different one, when there may be others whose proofs may have been regulated by what he has done. Nor can I approve of a creditor lying by until those consequences have taken place, and then coming forwards to abandon the

(a) 2 Gl. &amp; J. 4.

(b) Buck, 7; 2 Ro. 389.

(c) Mont. & Ch. 111; 3 Dea. 541; and see *Ex parte Downes*, 18 Ves. 326; and *Ex parte Davenport*, 1 M. D. & D. 326.

1841.

Ex parte  
Dixon.

proceeding which he has advisedly taken. Such permission cannot be given to him as a matter of course. In *Ex parte Liddel* (a), Lord *Eldon* said, "The holder of this bill of exchange, modelling his proof upon the right which the law gave him of confining his claim to the visible members of a partnership, or of extending it to the dormant, has made a deliberate, and I think a conclusive, election. Adopting the aggregate liability of all his debtors, he is excluded now from resorting to them individually." I am of the same opinion in this case.

The ORDER was, however, by the consent of the assignees, made as prayed, the petitioner paying the costs.

(a) 2 Ro. 36.

Sejeants' Inn  
Hall,  
July 27.

The title deeds of property belonging to one of two partners in trade are deposited with a banking firm, to secure the balance on the account current between the banking firm and the partnership. On a particular advance being afterwards made by the former to the latter, the partner to whom the deeds belong writes a letter to the effect, that the object of the deposit is to secure that "as well as any future advances." An alteration takes place in the members of the banking firm, but the new firm retain the deeds and continue to advance money to the partnership. Held, that the existing banking firm were entitled to the benefit of the security.

Ex parte JOHN SMITH and others.—In the matter of FREDERICK GYE and RICHARD HUGHES.

THE principal question which arose upon this petition, was, whether a deposit of title deeds by way of equitable mortgage, to secure the balance due for the time being upon an account current, was a continuing security, notwithstanding a change of partners in the firm with whom the deposit was originally made.

On the 31st of December 1828, the bankrupts, who were then carrying on business as tea-dealers in the City of London, borrowed of the banking firm of Messrs. *Smith, Payne, and Smiths*, a sum of money upon the security of a deposit of the title deeds of an estate at

that the existing banking firm were entitled to the benefit of the security.

Finchley, which belonged solely to the bankrupt *Richard Hughes*. It was stated to have been agreed, that the deposit should extend to secure any sums of money which the firm should advance to the bankrupts. No written memorandum was however at this time signed. On the 13th of November 1834 a further advance was made by the bankers to the bankrupts, when the bankrupt *Richard Hughes* wrote to them a letter to the following effect :

“ Messrs. *Smith, Payne, and Smiths.*

Gentlemen,—I herewith send you eight notes of 500*l.*, in compliance with the arrangement made with me to day, and for which I am greatly obliged. The deeds you hold of mine are placed in your hands, as a security for this, as well as any future advances.

I am, &c. *Richard Hughes.*”

In the beginning of the year 1839, a change having taken place in some of the partners of the banking firm of *Smith, Payne, and Smiths*, the petitioners, who then constituted the firm, made advances of money to the bankrupts ; and they stated by their petition, that from that time to the time of the fiat, they had continued to advance large sums of money to the bankrupts at their request, and had from time to time renewed the eight notes for 500*l.* each, mentioned in the letter, and had up to the present time retained in their possession, with the knowledge and approbation of the bankrupts, the above-mentioned title deeds ; the bankrupts during all such time applying for such advances and renewals, and the petitioners, as members of the firm, consenting to make and give the same, upon the common understanding and agreement that such advances and renewals were to be made and given upon the security of the deeds. The petition further stated, that early in the year 1839, the

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Ex parte  
SMITH  
and others.

1841.

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and others.

bankrupts deposited with the petitioners, as a further security, certain wine warrants. On the 6th of March 1839 the petitioners advanced a further sum of 2000*l.* to the bankrupts, upon the security of a policy of assurance, which was assigned to them by an indenture dated on that day, and was by the indenture mentioned to be given in addition to any other security which the petitioners then had or might have for the sum of 2000*l.* then advanced.

An Order had been obtained by the petitioners upon a former petition, for an inquiry before the Commissioner as to the amount due to them upon their securities, and for a sale of the property comprised in the deposited documents; the purchase money, after payment of the expenses of the sale, being ordered to be paid into the bank, subject to the further order of the Court. Under the order of reference, the Commissioner found the sum of 8500*l.* 18*s.* 8*d.* to be due to the petitioners, of which he found the sum of 2025*l.* 5*s.* 9*d.* to be due upon the security of the wine warrants and policy of assurance. The remainder he found to be due, in respect of the security upon the estate at Finchley. The present petition complained of the latter part of this finding, and prayed for a declaration that the petitioners were mortgagees of the estate at Finchley for the whole of the sum of 8500*l.* 18*s.* 8*d.*, and were mortgagees of the policy and warrants for 2025*l.* 5*s.* 9*d.*, part of the aforesaid sum. The petition also prayed for a sale of the wine warrants, which were the only parts of the securities that had not been sold under the former order, and for all necessary directions for perfecting the former sale by the requisite conveyances to the purchasers, and for the usual consequential directions with respect to the application of the

proceeds of the sales and proof of so much of the petitioner's debt as those proceeds should be insufficient to satisfy.

1841.  
  
 Ex parte  
 SMITH  
 and others.

Mr. *Swanston*, and Mr. *Calvert*, for the petition.

Mr. *Spence*, and Mr. *Steere*, for the assignees. The security on the estates at Finchley was created by the deposit of the title deeds, and the letter of the 15th of November 1834. The present petitioners are not the same individuals with whom that deposit was made, and to whom the letter was written. There has been a change in the firm; and it has been held, that a mortgage to a partnership to secure the payment of all sums then due or thereafter to become due, does not extend to advances made by the firm, after another partner has been taken in (a). This is indisputably so when the security is given by a surety (b), as it may be considered to have been in the present case; the property not being that of the debtors jointly, but belonging to one separately, who must therefore be regarded as having pledged it in the character of surety for the firm.

Mr. *Swanston* was not called upon to reply.

Sir JOHN CROSS.—In this case I find that upwards of twelve years ago the two bankrupts had an account current with the banking house of Messrs. *Smith, Payne*,

(a) See *Ex parte Watson*, 19 Ves. 459; *Ex parte Marsh*, 2 Rose, 239, and cases there cited in note.

(b) See *Wright v. Russell*, 3 Wilson, 530; 2 W. Bla. 934; *Myers v. Edge*, 7 T. R. 254; *Weston v. Barton*, 4 Taunt. 67; *Spiers v. Houston*, 4 Bligh, N. S. 515; *Simson v. Cook*, 1 Bing. 452; *Pitman on Principal and Surety*, p. 47.

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Ex parte  
SMITH  
and others.

and *Smiths*, which account current continued up to the time of the bankruptcy. In 1828, it appears that certain title deeds were deposited, without any written memorandum, for the purpose of securing the balance which might be due to the banking firm from time to time upon this account current. In 1834 an express memorandum was signed by Mr. *Hughes*, stating the deposit to have been made for the purpose of securing future advances in the course of the then running and subsisting account; and promissory notes to the amount of 4000*l.* were given at the same time as a further security. It is now urged, that the advances made by the firm, with whom the deposit was made, have been all paid off, and that the debt now claimed by the petitioners has arisen within the last half year, that is to say, since the members of the banking firm have been changed; but it appears to me to be of no consequence how many changes may have taken place in the constitution of the firm, provided the title deeds were left in the custody of the partners for the time being, with the consent of the depositors, and upon the understanding that they were to remain a security for the balance of the account. It is not necessary that on every change or modification of the partnership, the deeds should be returned for the purpose of being deposited anew. The fact of their being left at the bank may operate as a fresh deposit, and the parties may express their intention as clearly by acts as they could by words; and sometimes, indeed, still more clearly. It appears to me, that they have done so in this case; and that the evidence here is complete and conclusive, as to the fact of the deeds being intended to remain as a security for the balance due for the time being to the petitioners. I am therefore of opinion, that the deeds have been pro-

perly retained by them as a security for their whole debt; and, the amount of it having been ascertained by the Commissioner to be 8500*l.* 18*s.* 8*d.*, they must be declared to be equitable mortgagees of the estate at Finchley for that amount.

1841.

Ex parte  
SMITH  
and others.

Ex parte PICKSTOCK.—In the matter of PICKSTOCK.—

Serjeants' Inn  
Hall,  
July 30.

MR. G. L. Russell, on behalf of the bankrupt, applied to the Court for an Order to stay the advertisement of the bankruptcy in the Gazette, on the ground that the party had committed no act of bankruptcy. The bankrupt had made an affidavit, stating that to the best of his belief he had committed no act of bankruptcy. All that was now wished was, that the proper officer might produce the proceedings that had been taken before the Commissioners, in order that the Court may look at them and see whether there was really a good act of bankruptcy proved, before the Commissioners proceeded to adjudication. In the matter of *Bryant (a)* the same course was adopted by the Court.

Quere, whether the Court will, on the application of the bankrupt, make an Order to stay the advertisement, where the bankrupt has presented no petition to annul the fiat.

Sir JOHN CROSS.—The case referred to was on the application of a creditor, and not of the bankrupt. I think the Court cannot make any Order on the present application. There is no instance of the Court ordering the advertisement to be stayed at the solicitation of the bankrupt, unless he has presented a petition to annul the fiat. The bankrupt himself cannot be a sufficient master of the subject, to know whether or not he has committed what the law considers to be an act of bankruptcy.

(a) 2 Deac. 140.



1841.

Ex parte  
LICKSTOCK.

Mr. *G. L. Russell* afterwards made the same application to the Lord Chancellor, who consented to inspect the proceedings; but, finding there was *prima facie* a good act of bankruptcy appearing on the depositions, his lordship also refused to make any Order to stay the advertisement.

Serjeants' Inn  
Hall,  
July 30.

Ex parte HENRY HAWKINS and another.—In the matter of WILLIAM WORSFOLD. —

Where the petitioning creditor's debt was found to be invalid, and no debt of sufficient amount to support the fiat, and incurred not anterior to the alleged petitioning creditor's debt, had been proved, so as to be substituted on the proceedings; the fiat was annulled, on the petition of the assignees, and without any prayer to issue a new fiat; the bankrupt not being indebted to them, either separately, or jointly, in a sufficient amount to support a fiat.

THIS was a petition of the assignees, praying to annul the fiat, on the ground that the petitioning creditor's debt was insufficient to support it. The fiat was sued out on the 3rd February 1841, on the petition of *Andrew Ross*; who at the second public meeting tendered a proof for the sum of 150*l.*, as indorsee of a bill of exchange, indorsed by the bankrupt; which bill *Ross* had discounted for one Mr. *Overbury*, to whom the bankrupt had indorsed it. It appeared, that the bill was overdue at the time of such discount, and was not delivered by *Overbury* to *Ross* until the day previous to *Ross* striking the docket on which the fiat issued; and that *Overbury*, who was *Ross*'s attorney, had, previous to the delivery of the bill to *Ross*, obtained judgment against the bankrupt in an action brought by him upon the bill, in the name of a person called *Neate*. The Commissioners rejected the proof; upon which the assignees summoned *Ross* before the Commissioner, in order that he might be examined, and support, if he could, a sufficient debt to sustain the fiat. On the 12th May 1841 *Ross* attended for this purpose, when the above facts appeared from his

examination; and he also stated that when *Overbury* applied to him to discount the bill, he told him it was for the purpose of striking the docket against the bankrupt; and that he wished *Ross* to strike the docket, instead of himself. On the last mentioned day, Mr. *Overbury* also attended the Commissioner, and tendered a proof as indorsee of the bill; the consideration for which he swore was giving possession to the bankrupt, at the request of the drawer of the bill, of certain premises contracted to be sold by *Overbury* to the bankrupt. But he admitted upon his examination before the Commissioner, that he had previously sued the bankrupt on the bill in the name of a client, and had obtained final judgment against him. On this ground, the Commissioner rejected the proof tendered by *Overbury*; and adjourned the bankrupt's last examination *sine die*; assigning as a reason for such adjournment, that it was doubtful whether there was any valid petitioning creditor's debt.

The petitioners alleged, that no debt sufficient to support a fiat, and not anterior to the alleged debt of the petitioning creditor, had been proved under the fiat, and that the petitioners were therefore unable to procure a substitution of any other debt to support the fiat. That the petitioners were not jointly, nor was either of them separately, a creditor of the bankrupt of a sufficient amount to support a fiat; and that no creditor of a sufficient amount would sue out a fiat; and, therefore, that the petitioners were disabled from praying, that, on the annulling of the present fiat, a new fiat might issue against the bankrupt.

The prayer was, that the fiat might be annulled at the expense of *Ross*, the petitioning creditor; or that the petitioners might be discharged, at the expense of *Ross*,

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Ex parte  
HAWKINS  
and another.

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HAWKINS  
and another.

from being the assignees of the estate and effects of the bankrupt; and that *Ross* might pay the costs of the application.

Mr. *Swanston*, and Mr. *Chandless*, in support of the petition, urged that the bankrupt's liability on the bill of exchange was merged in the judgment; and referred to *Ex parte Christy* (a), where, *B.* and *C.* having given a joint and several bond to *A.*, and also a joint warrant of attorney (as part of the same security), upon which a joint judgment was afterwards entered up, it was held, that the bond was merged in the judgment, and that *A.* could only prove against the joint estate of *B.* and *C.*

Mr. *Bacon* appeared for the bankrupt, and alluded to some differences between the bankrupt and the petitioning creditor.

Sir JOHN CROSS.—The Court has nothing to do on this petition with any dispute between the petitioning creditor and the bankrupt.

Mr. *J. Russell*, and Mr. *Petersdorff*, for the petitioning creditor. The bankrupt had been concerned in concealing and securing his property, and that was the reason why Mr. *Overbury* deemed it advisable to issue this fiat. The assignees, who now petition to annul it, have been acting under the fiat for several months, and should have applied before, if they doubted the validity of the fiat. There was no merger of any kind before the bankruptcy; for judgment was not obtained in the action on the bill until the 5th February, which was two days

(a) 2 Deac. & C. 155.

after the issuing of the fiat; that having been sued out on the 3rd February. *Ex parte Christy* (a), which has been cited by the other side, does not apply to this case; for there the judgment was obtained by the petitioning creditor himself; here it was obtained by another person. But the doctrine of merger is not applicable to bills of exchange or negotiable securities, when the title is not derived from the judgment creditor. In *Bryant v. Withers* (b), it was held to be no objection to the petitioning creditor's debt, that he had, on striking the docket, made an affidavit of his debt as for goods sold and delivered, although he had at the time obtained judgment in an action brought to recover the price of the goods,—and that he had not relinquished his judgment, before he presented the petition for a commission. Even in questions of merger, the debt is not extinguished, nor the liability effected, but merely the remedy; the merger has only reference to the form of action. There is a distinction between a case where a bill is negotiated after it is due, and where it is merely returned after it is due to a party antecedently liable. In the present case, *Overbury* takes up the bill before the judgment was obtained, in discharge of his own liability as indorser, and then seeks to make it available against the party primarily liable; which he had an undoubted right to do; *Macdonald v. Bovington* (c). It has never been suggested by the bankrupt, that he had not a good consideration for the bill. It is sworn by *Overbury*, that the bankrupt, by reason of giving this bill, got into possession of the property which he had contracted to purchase of *Overbury*. That, of itself, is a sufficient consideration. An executory contract is a good consideration for a bill

1841.

Ex parte  
HAWKINS  
and another.

(a) 2 Deac. & C. 155.

(b) 2 Rose, R.

(c) 4 T. R. 825.

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 Ex parte  
 HAWKINS  
 and another.

of exchange, even though the contract is not performed before the bill falls due. Thus in *Moggridge v. Jones*(a), where *A.* agreed to execute a lease of premises to *B.*, and *B.*, on being let into possession, accepted a bill for the consideration money drawn on him by *A.*, it was held no defence to an action on the bill by *A.*, that he refused to execute the lease; the remedy of *B.* for this refusal being only on the agreement.

Sir JOHN CROSS.—The question is simply this—is there a good petitioning creditor's debt to support this fiat? The whole matter in dispute arises out of the transactions between *Overbury* and the bankrupt. It appears, that the bankrupt agreed to purchase some property of *Overbury*, in part payment for which he gave two bills of exchange; and it is an undisputed fact, that the purchase has never been completed. *Overbury* had, no doubt, a right to sue the bankrupt on both these bills; but then in such action the proof of the consideration given for them might be material. It was more convenient, therefore, that he should transfer them to other persons; and he accordingly gets two friends to bring separate actions on the bills, in which it would not be requisite for himself to appear as a party. It does not appear, that *Neate*, in whose name an action on one of these bills was brought, gave any consideration for the bill, but merely allowed the use of his name in the action. *Overbury* then goes to *Ross* to make the acceptor of the bill a bankrupt. This seems to me a mere contrivance to enforce the payment of purchase money, on a contract which was never completed. The petitioning creditor's debt was not real, but concocted for the purposes of the

(a) 14 East, 486.

fiat; and the alleged act of bankruptcy was prior to his obtaining possession of the bill, which was only the day previous to the issuing of the fiat. Under all these circumstances, I am of opinion that the bankrupt was not really indebted to *Ross*, the petitioning creditor, but to *Overbury*; and that there is no good petitioning creditor's debt established, or to be established, to support the fiat.

1841.

Ex parte  
HAWKINS  
and another.

Fiat annulled, with costs. The bankrupt to have his costs from the assignees, to be recovered by them from the respondents.

Ex parte HENRY BARNETT.—In the matter of JAMES HARDY.—

Serjeants' Inn  
Hall,  
July 30 & 31.

THIS was the petition of a creditor to annul the fiat, at the costs of the bankrupt, the solicitor, and the petitioning creditor, on the ground that the act of bankruptcy was concerted between them, and that the object of the fiat was not for the purpose of distributing the bankrupt's effects among his creditors, but merely to serve the purposes of the bankrupt.

Where the act of bankruptcy was concerted between the solicitor, the petitioning creditor, and the bankrupt, for the sole purpose of defeating an execution creditor, and the solicitor was the prime mover of the plot: the fiat was annulled, with costs as against the solicitor, the bankrupt, and the petitioning creditor.

The circumstances, under which the fiat was issued, have been already stated in a prior report of the case of *Ex parte Woodward (a)*.

Mr. *Bacon*, in support of the petition, contended that the fiat was an abuse of the process of the Court, and that the solicitor, who was a principal party in contriving the act of bankruptcy, must be visited with costs, as well as the petitioning creditor and the bankrupt.

(a) See ante p. 249.

1841.  
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Ex parte
 BARNETT.

Mr. *K. Parker*, and Mr. *Anderdon*, for the solicitor. There are not more than three instances in the books, in which a solicitor who issues a fiat has been visited with costs, on a petition to supersede; and then only in a case of gross fraud. Now what fraud can possibly be charged against the solicitor in the issuing of this fiat? It is not because the petitioning creditor and the bankrupt are instruments in the hands of the solicitor for the purpose of issuing a fiat, that he is to incur the penalty of the costs of annulling it. Nay, in a case of this description, where the object of a solicitor in issuing a commission was to effect that which was advisable and just among the creditors of a bankrupt, the Vice Chancellor not only refused to supersede the commission, but dismissed the petition for a supersedeas with costs; *Ex parte Gane* (a). But the laches of the petitioner, in not having sooner applied to annul the fiat, are an incontrovertible answer to this petition. The fiat has been worked for no less a period than a year and a half. Why has this petition not come here before? In *Ex parte Bostock* (b), where a fiat had issued on a concerted act of bankruptcy, and four months elapsed before a creditor petitioned to annul it, and the assignees were not privy to the concert, and wished the fiat to proceed, the Court refused to annul it.

Mr. *Ellison*, for the bankrupt. In this case there is no act of bankruptcy, upon which the fiat can be supported. That distinguishes the case from *Ex parte Bostock*; where it appeared that the bankrupt had committed another act of bankruptcy which was not concerted. The bankrupt, therefore, is justified in wishing this fiat to be annulled; for the assignees would not be able to

(a) 2 G. & J. 319.

(b) 1 Mont. Deac. & D. 344.

recover under it any of the bankrupt's property. And with respect to the payment of the costs by the solicitor,—in a case where the circumstances were very similar to those of the present case, Lord *Eldon* superseded the commission, at the costs of the solicitor and the petitioning creditor; *Ex parte Prosser* (a).

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Mr. *Swanston*, for the petitioning creditor. The first question is, whether this fiat could not be supported, upon proof of another act of bankruptcy. Now, that it may be so supported, is clearly shown by the decision of the Court of King's Bench in *Tappenden v. Burgess* (b). But then, unfortunately in this case, *Spittle* was the petitioning creditor, as well as the sole assignee, and therefore could not avail himself of another act of bankruptcy.

Sir JOHN CROSS.—There is no question but that this fiat ought to be annulled; and the only thing for the consideration of the Court is, who ought to be made to pay the costs of this petition. The whole proceeding is undoubtedly a contrivance of *Woodward's*, and a very culpable contrivance. The sole and immediate object of issuing the fiat was to defeat an execution creditor; and the plot formed for this purpose was more like a Christmas sport or revel, than any thing else I can liken it to. The whole farce was played at ten o'clock on Christmas eve. *Woodward* takes upon himself to cast the parts of the different actors; but they want a principal performer, in the shape of a creditor to call and demand the payment of his debt, *Cliff* refuses to undertake the part, at so short a notice; upon which *Spittle* is persuaded

(a) Buck, 27.

(b) 4 East, 236.

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to enact it; *Woodward* all the while officiating as prompter, and instructing the various parties how to act. They accordingly go through all the mummerly of a bankruptcy; for *Spittle* never expected that the bankrupt would pay the debt, when he called to demand the payment of it. Although *Woodward* appears to be the most culpable of any of these parties, yet the Court can make no distinction between them; they are all in *pari delicto*, and they must settle the costs between themselves, being all chargeable with costs alike. The fiat must, therefore, be annulled with costs. I am sorry for the loss which Mr. *Woodward* will sustain from his own conduct; but it must be remembered, that on a former occasion he came here to impeach the very fiat, which he now swears to be a good one.

Fiat annulled, with costs.

Serjeants' Inn
Hall,
July 30.

Where the bankrupt executed several distinct mortgages of different estates, his assignees cannot apply to redeem one mortgage, without also redeeming the others.

Ex parte THOMAS MASSA ALSAGER and others.—In the matter of THOMAS JAMES BREEDS.—

THIS was the petition of assignees to redeem a mortgage. It appeared that the bankrupt, being possessed of a copyhold house and premises at Berwick, in the county of Sussex, on the 12th January 1827, made a surrender of them to the use of *William Lucas Shadwell*, subject to redemption on payment of the sum of 700*l.*, and interest, and executed a bond for further securing the repayment of that sum. On the 27th November 1830, the bankrupt by another surrender further charged the property with the sum of 550*l.*, and interest, and also executed another bond for further securing such

last mentioned sum. Besides these two mortgages, the bankrupt executed several other mortgages of lands and tenements to *William Lucas Shadwell*, for securing the repayment of other sums of money, distinct from the above mentioned mortgages.

The fiat issued on the 27th February 1837, when the two sums of 700*l.* and 550*l.* still remained due from the bankrupt, with an arrear of interest thereon.

The petition stated, that the assignees were desirous of effecting a sale of the property so mortgaged, and of paying off the several sums of money due on the afore said securities out of the monies to arise by such sale, and further of appropriating the surplus (if any) of such purchase money for the benefit of the creditors of the bankrupt; but that *William Lucas Shadwell* claimed a right of tacking his other mortgages to the mortgage and further charge above set forth, and refused to permit the petitioners to redeem the premises, without the redemption of all the mortgages held by him. That the petitioners were unwilling to proceed to a sale of the mortgaged premises, without first obtaining the sanction of this Court; and they submitted, that the equity of redemption of the property formed a part of the assets of the bankrupt, and that the petitioners, as such assignees, were entitled to redeem the same premises for the benefit of the bankrupt's creditors, upon payment of the mortgage monies secured thereon, and now remaining due.

The prayer was, that the Commissioner acting under the fiat might take an account of the principal, interest, and costs due on such mortgage and further charge; and that the property might be sold before the Commissioner, and the mortgagee be at liberty to bid at the sale, and the

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monies to arise by such sale might be applied, after payment of the expences of the sale, in payment and satisfaction of what should be found due on the mortgage and further charge; that the surplus monies (if any) might be paid to the petitioners, as such assignees; and, in case the monies to arise by the sale should be insufficient to satisfy the mortgage, then that the mortgagee might be admitted to prove for the deficiency.

Mr. *Walford*, in support of the petition. If this had been a question merely between the mortgagor and mortgagee, then there would be no doubt but that the mortgagor could not redeem, without satisfying also the other securities; *Baxter v. Manning* (a). But the principle,—that where two distinct estates are mortgaged for two distinct debts, a separate redemption cannot be decreed,—operates only as long as the equities of redemption are united in the same person; *Willie v. Lugg* (b). The case of *Challis v. Casborne* (c) would seem at first sight to overrule the case in *Vernon*; but it does not do so, in fact, as is shown by Mr. *Cox* in his note to *Coleman v. Winch* (d), where he distinguishes between a *mortgagor* coming to *redeem*, and a *mortgagee* bringing his bill to foreclose.

The present case, however, being one not between the mortgagee and the mortgagor, but between the mortgagee and the *assignees* of the mortgagor, the rule that requires the redemption of all the other securities does not apply; *Coleman v. Winch* (d); where it was held, that if the heir of the mortgagor assign over the

(a) 1 Vern. 244. But see *Morret v. Paske*, 2 Atk. 53.

(b) 2 Eden Rep. 78.

(c) Prec. in Ch. 407.

(d) 1 P. Wms. 776.

equity of redemption, and the assignee bring his bill to redeem, he shall pay the mortgage only, and not a bond given subsequent to the mortgage. And, *a fortiori*, the rule will not apply, as between the mortgagee and the creditors of the mortgagor. Thus in *Heams v. Bance* (a), a mortgagee, who lent a further sum upon bond, was not allowed to tack it to his mortgage, in preference to creditors under a trust created by the will of the mortgagor for payment of debts. And the same doctrine was held in *Lowthian v. Hasel* (b), and *Hamerton v. Rogers* (c). The case of *Ireson v. Denn* (d) may be cited by the other side, as an authority against the position now contended for; but that was a case between the mortgagee and a purchaser of the equity of redemption, and not one, as in the present instance, between the mortgagee and the creditors of a mortgagor who has become bankrupt. Some cases may also be cited on the other side, which show that a judgment may be tacked to a mortgage, as against creditors; but there the judgment is considered as a clear lien on the land. The case of *Ex parte Bignold* (e), where this Court refused to make an Order for the sale of a mortgaged estate, which was subject to other incumbrances, is distinguishable from the present case; for there the other incumbrancers were strangers, and were not before the Court; while, in this case, all the other incumbrances are in the hands of the mortgagee.

Mr. *Swanston*, *contra*. The point which is now brought before the Court has been settled by several

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(a) 3 Atk. 630.

(b) 3 Bro. 162.

(c) 1 Ves. jun. 513.

(d) 2 Cox Rep. 425.

(e) 3 Mont. & A. 706; 1 Deac. 515.

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cases, an abstract of which is given in Mr. *Coote's* Treatise on Mortgages (a). The only case, that is decidedly to the contrary, is to be found in *Eden's* Reports of Cases in the time of Lord *Northington*. But, although there are several good cases in that book, there are also several bad ones; as, for instance, the case of *Hurden v. Parsons* (b), where it is laid down that a trustee lending money on personal security out of the trust fund is not guilty of a breach of trust. In the present case, we submit that a Court of equity is entitled to say, that where a creditor has a real security, the debtor shall not be permitted to redeem, without paying the whole debt. And it appears from *Ex parte Pollard* (c), that where any equities affect the bankrupt, they also affect the assignees; and that the latter take exactly the same title which the bankrupt had, neither more, nor less. The very question now mooted has been the subject of three different decisions of the Court of Chancery. In *Pope v. Onslow* (d), where the assignee of a bankrupt filed his bill to redeem a mortgage of the Manor of Newington made by the bankrupt to the defendant, and the defendant by his answer stated that he had first lent the bankrupt 200*l.* on mortgage of a *particular tenement*, and afterwards 300*l.* on the manor, which was of better value than the money due, and that the first mortgage was deficient in value; it was adjudged that if the plaintiff would redeem one, he should redeem both. So in *Ex parte Carter* (e), where a bankrupt had made two separate mortgages of different estates to the same person, and had afterwards sold the equity of redemption of one

(a) P. 483.

(b) 1 Eden Rep. 145.

(c) Mont. & C. 239; 4 Deac. 27.

(d) 2 Vern. 207.

(e) Amb. 733.

of them, it was held that the purchaser of the equity of redemption could not redeem that mortgage only, but must redeem both. And the same point was decided in *Ireson v. Denn* (a), which cannot be distinguished from this; for there Lord *Alvanley* says, that a mortgagee of two distinct estates upon distinct transactions from the same mortgagor was entitled to hold both,—even against the purchaser of the equity of redemption of one of the mortgaged estates, without notice of the other mortgage,—until payment of the whole money due on both mortgages. And again, in *Jones v. Smith* (b), the same learned judge observes, that the Court of Chancery will not under these circumstances interpose in favour of the redemption of one mortgage, without the redemption of both. From these cases, it is manifest that Lord *Northington* was quite in error in his decision in *Willie v. Lugg* (c); the current of modern authorities, as observed by Mr. *Coote* (d) in his comment on that case, being certainly to the contrary.

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Mr. *Walford*, in reply. The case of *Pope v. Onslow* (e), which has been relied on by the other side, Lord *Hardwicke* would not permit to be cited as an authority in *Ex parte King* (f). And with regard to the impeachment of the doctrine laid down by Lord *Nor-*

(a) 2 Cox Rep. 425.

(d) Coote on Mortgages, 490.

(b) 2 Ves. jun. 376.

(e) 2 Vern. 286.

(c) 2 Eden, 78.

(f) 1 Atk. 300. Mr. Coote, however, in his treatise on Mortgages, p. 486, says, that Lord *Hardwicke* soon corrected his opinion; for in the much stronger case of *Titley v. Davis* (cited in *Ex parte Carter*, Ambl. 753,) on an appeal to him from the Rolls, where a decree had been made on a bill filed by a purchaser of the equity of redemption of one of two estates in mortgage, that he must redeem both, and not one only, his lordship affirmed the decree.

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thington in *Willie v. Lugg* (a), it is manifest from what Lord *Thurlow* says in the case of *Vanderzee v. Willis* (b), that the decision of Lord *Northington* was correct. Lord *Thurlow* observes, "All the cases agree, that if the executor assigned the equity of redemption, it would put an end to the tacking; so it would, if the specialty creditor brought the bill. I am afraid, the rule has been laid down too broad, and that there being a decree for creditors to come in, they must redeem on payment of the 1000*l.* and interest;" notwithstanding the fact was in that case, that the depositor of the securities was at his death indebted in a larger sum to his bankers, the depositaries. The cases cited by Mr. *Eden* in his note to *Willie v. Lugg* (c) do not bear him out in the position he endeavours to establish. In *Jones v. Smith* (d), what is said to have been ruled by Lord *Alvanley* is a mere *obiter dictum*; for the only point decided in that case was, that where personal securities were pledged for a specific debt,—and, after a mortgage to the creditor, the same securities with others were pledged by him for the balance of an account,—the transactions being distinct, redemption of the personal securities was decreed, without discharging what was due on the mortgage.

Sir JOHN CROSS.—The principle appears to me to be clearly settled, that a mortgage of distinct property may be tacked to a mortgage of other property; and that when the mortgagor applies to redeem, he cannot redeem one without the other. My present impression is, that the assignees of a bankrupt mortgagor stand in his place, and are subject to all the equities of the bankrupt. But I will look

(a) 2 *Eden Rep.* 78.(b) 3 *Brown*, 23.(c) 2 *Eden Rep.* 80.(d) 2 *Ves. jun.* 372.

into the cases that have been cited, and if I find reason to alter my opinion, the parties shall be apprised of that fact from the registrar. If they hear nothing to the contrary, the Order will be for the

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Petition to be dismissed with costs.

Ex parte DANIEL BRITTEN.—In the matter of
DANIEL BRITTEN.—

Westminster,
Nov. 5 and
Dec. 8.

IN this case the bankrupt had some time back presented a petition to annul the fiat, which was dismissed. He afterwards presented another petition for the same purpose, which was heard in the long vacation, and the same result followed; and, in order to protect the respondents from being harassed by useless litigation, the Court dismissed this second petition with costs. To enforce the payment of the costs, the respondents had obtained the common four day Order; but that had hitherto been of no avail. The bankrupt was a prisoner in the custody of the marshal of the Queen's Bench; and the question was how far the detention of the bankrupt could be insured, so as to compel the payment of these costs.

Where an Order was made against a party, who was a prisoner in the Queen's Bench, for the payment of the costs of a petition, an Order may be made, under the 1 & 2 Vict. c. 110. s. 18., to charge him in execution for the costs.

Seemly, that the Court of Review has in such case no authority to issue a writ of *habeas corpus* to bring up the party, in order that he may be charged on a warrant of commitment for non-payment of the costs.

Mr. *Bacon*, on behalf of the respondents, now moved for a writ of *habeas corpus cum causâ*, to bring up the bankrupt and charge him with the warrant of commitment of this Court, which, in the ordinary course of proceeding in this Court, as well as in the Court of Chancery, would be directed to the warden of the Fleet. The question as to the power of this Court to issue a *habeas*

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Ex parte
BRITTEN.

corpus was discussed, but not decided in *Ex parte Jones* (a). But it is submitted that this Court has authority to do so, under the provisions of the Bankruptcy Court Act, 1 & 2 W. 4. c. 56.; the first section of which declares that this Court "shall have, use, and exercise all the rights, incidents, and privileges, as fully to all intents and purposes as the same are used, exercised, and enjoyed by any of his Majesty's Courts of Law or judges at Westminster." And by section 4, it is also declared, that it shall be lawful for the Court of Review to issue process "to enforce the orders and decrees of the Court, and to that end to exercise all the powers vested for such purpose in any of his Majesty's Courts of Record at Westminster."

Sir JOHN CROSS.—As at present advised, I think this Court has not the power to issue a writ of *habeas corpus*, which is only given by the 30 Car. 2. c. 2. to the Lord Chancellor and the judges of the King's Bench, Common Pleas, and Exchequer (b). But I will consider the effect of the sections of the Bankruptcy Court Act that have been referred to, as well as the clause in the act for the abolition of arrest for debt on mesne process, 1 & 2 Vict. c. 110. s. 18., which empowers this Court to enforce its orders in the same manner as in the Courts of common law.

December 8.

Sir JOHN CROSS now said, that he had been unable to find any precedent to justify the Court in granting the application, and none had been suggested at the bar. It is probable, however, that the applicant may find a better

(a) 2 Mont. & A. 41; 4 Deac. & C. 536.

(b) See *Ex parte James*, 3 Deac. 528, note.

course suggested by the 18th section of the 1 & 2 Vict. c. 110., which declares that the orders and decrees of the Court of Review, whereby any sum of money, or any costs, charges, or expenses shall be payable, shall have the effect of judgments in the superior Courts of common law, and that the persons to whom the same shall be payable shall be deemed judgment creditors; and all remedies thereby given to judgment creditors are in like manner given to persons, to whom any monies or costs, charges or expenses are by such orders directed to be paid. It will be therefore for counsel to consider whether this enactment will not serve the intended purpose.

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Ex parte
BRITTEN.

Mr. *Bacon* then consented to take such an Order as would charge the party in execution for the costs, under the 1 & 2 Vict. c. 110. s. 18.

Note. The matter was again mentioned this day, when the Court granted an Order for bringing up the bankrupt from the Queen's Bench, for the purpose of recommitting him to that prison under an Order of detention until the costs should be paid.

1842.
January 17.

Ex parte BATES.—In the matter of BATES.—

THIS was a petition of the bankrupt to annul the fiat, on the ground of his infancy. It appeared that he began business in March 1840, and was married in the following April; upon which occasion he made an affidavit that he was twenty-one years of age. In support of the present application, his mother, and another person who was

Westminster,
Nov. 5.

Where the bankrupt applied to annul the fiat on the ground of infancy, and it appeared that on the occasion of his marriage, a year before the fiat issued,

he had made an affidavit that he was then of age, his petition was dismissed with costs.

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present at his birth, had made affidavits that he was not twenty-one, having been born on the 16th January 1821.

Mr. *Fitzherbert*, for the petitioner. The bankrupt, in procuring a licence for his marriage, might have made a mistake in his affidavit, without any intention to perjure himself.

Mr. *Keene*, *contra*, relied on the case of *Ex parte Watson (a)*, where a bankrupt, who had held himself forth to the world as an adult and *sui juris*, and had traded in that character for two years, contracting debts to a considerable amount, applied to supersede the commission on the ground of infancy; when Lord *Eldon* dismissed his petition, and left him to his action at law.

Sir JOHN CROSS.—Admitting the fact, that the bankrupt was really not of age when the fiat issued,—the affidavit that he made when he married, in which he swore that he was then of age, operates as an estoppel to the present application. This is a stronger case than that of *Ex parte Watson (a)*, where the bankrupt merely represented that he was of age; but here he holds himself out on oath as an adult.

Mr. *Keene*. As the petitioner has made this application by his next friend, *James Massey*, it is submitted that *Massey* is liable to the costs of this petition.

The COURT acceded to this view of the case.

Petition dismissed with costs, as against *Massey*.

(a) 16 Ves. 265.

1841.

Ex parte TURQUAND.—In the matter of B. and S.

VANDERPLANK.—

THIS was the petition of an assignee, praying to expunge a proof for 3913*l*. The bankrupts had carried on the trade of woollen drapers, and one *Evill* had been in the habit of supplying them with goods. In April 1839 some negotiation took place between the bankrupts and *Evill* respecting the formation of a partnership between them, the terms of which were reduced to writing by *Evill*, but were never signed by any of the parties. One of the stipulations of the agreement was, that *Evill* should make an advance of 2000*l*., half in cash, and half in woollen goods, to be furnished by him at prime cost; which stipulation he performed, by depositing bills with the bankrupts, and delivering goods to the requisite amount; the delivery of the goods being unaccompanied with an invoice, as had been the practice on former occasions. Another stipulation of the agreement was, that the intended partnership should be carried on under the firm of "*B. and S. Vanderplank & Co.*," the bankrupts having previously traded under the firm of *B. and S. Vanderplank*. This stipulation was also complied with, after the advance of the 2000*l*. Although *Evill* did not sign the agreement, yet in framing a sketch of the articles, he wrote his own name in the beginning of the instrument.

In June 1840, the bankrupts found themselves in considerable difficulties; and in July an action was brought against them by *Evill* for a sum exceeding 3000*l*., in which judgment was signed by consent, and execution was issued the same day on which the fiat was sued out;

Westminster,
Nov. 9 & 15.

Where a negotiation took place between *B. and S. V. and E.*, as to the admission of *E.* as a partner with them, and *E.* drew out a sketch of the terms of the intended partnership, two of which were, that *E.* should bring in 2000*l*., half in cash, and half in goods, and that the firm should be altered to that of *B. and S. V. & Co.*; and *E.* accordingly advanced the 2000*l*., upon which the words "*& Co.*," were added to the original firm; but no other act was done by *E.* to show that he considered himself as a partner, and he refused to sign any formal agreement for a partnership: *Held*, that this was not sufficient to constitute him a partner with *B. and S. V.*, so as to prevent him from proving the amount of his advances as a debt due from them to him, under a fiat issued against *B. and S. V.*

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Ex parte
TURQUAND.

which execution, however, was subsequently set aside as invalid. Under these circumstances, *Evell* applied to prove for the amount of his advances; contending, that such advances were made with a view to the completion of a partnership, only, upon being satisfied of the perfect solvency of the firm, and on the express understanding that the sums should be considered as constituting a debt, in the event of the failure of the arrangement for the partnership. The assignee opposed the proof before the Commissioner, on the ground that *Evell* was a partner with the bankrupts; but the Commissioner admitted the proof. It appeared that an action had been brought by a creditor, and was now pending against *Evell*, as a partner, and therefore liable for goods sold to the firm of *Vanderplank* and Co.

Mr. *J. Russell*, and Mr. *Elmsly*, in support of the petition. We submit, that *Evell* was, to all intents and purposes, a partner with the bankrupts under the new-adopted firm of "*B. and S. Vanderplank & Co.*" It is sworn by one of the persons who dealt with the house, that when the bankrupts added the words "and Co." to their former firm, it was generally understood that some other person had been taken into partnership. Another witness, of the name of *Fletcher*, swears that *Evell* was meant to be designated by the words "and Co.;" but that he did not wish his name to appear, and was desirous that the partnership should be kept secret. All the previous transactions between the bankrupts and *Evell*, as to the sale of goods to them, were in the usual mode of dealing between vendor and purchaser, and accompanied with an invoice; but, in the present instance,

that was not the case; there was no invoice accompanying the last delivery of the goods to the value of 5000*l*. The plea on the other side is, that the agreement for the partnership was not signed, and that it was only a conditional agreement and optional on the part of *Evill*. But notwithstanding it may be optional as between him and the bankrupts, yet, as between himself and third parties, he continues to be a partner up to the time he makes the option. Then, as to the signature of the document,—it is very true, that *Evill's* signature does not appear at the foot of it; but then he has written his name with his own hand in the beginning of the agreement. That is what amounts to a signature in law, and one on which a court of equity would decree a specific performance of the agreement, as being a sufficient signing to satisfy the Statute of Frauds; *Propert v. Parker* (a). It may be contended, that what was done was only in contemplation of a *future* agreement; but we submit, that it was an actual operative agreement; and the different acts done, in pursuance of the stipulations contained in it, show clearly that it was an existing agreement, which was being performed.

Sir JOHN CROSS.—If the petitioner can prove, that, from the nature of the dealings between the bankrupts and *Evill*, the latter acted as a partner with them, that will be sufficient. Suppose there is a negotiation between two parties for an agreement for a lease, and one of the parties is let into possession of the premises before the agreement is finally concluded, would not that establish the relation of landlord and tenant between the parties,

(a) 1 Russ. & My. 625.

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so as to ground a right of action for use and occupation by one party against the other?

Mr. *Anderdon*, and Mr. *Bacon*, *contra*. The question, in this case is, whether a man may not entrust another with money and goods, which he may at his option treat as the capital of a partnership, or convert into a debt. There is no doubt but that that can be done. Was there that done between these parties, that would have prevented *Evill* from bringing an action against the *Vanderplanks* for the money? Is the mere advance of this money sufficient evidence of a partnership? for that is the only evidence of a partnership adduced by the other side. Nothing else whatever was done in conformity with the agreement.

Mr. *J. Russell*, in reply.

Cur. adv. vult.

Nov. 15.

Sir JOHN CROSS.—This is the petition of the assignee of *B. and S. Vanderplank*, praying that a claim of a creditor for 3913*l.*, which had been admitted by the Commissioner, may be disallowed and expunged from the proceedings. It is not at present disputed, that the respondent made advances to the bankrupts to the amount claimed by him; but it was contended on the part of the assignees, that the advances were made in the course of a trade carried on by the respondent in co-partnership with the bankrupts, and that, consequently, there is no proveable debt in respect of it. Upon the argument, there arose three questions to be determined: *first*, whether there was a general partner-

ship between the bankrupts and the respondents; *secondly*, whether the transaction, out of which the claim arises, was in the nature of a partnership transaction; and *thirdly*, whether the conduct of the respondent entitled the assignees to consider him in the light of a partner. It appears, that, one year before the bankruptcy took place, the respondent and the bankrupts were in treaty respecting the formation of a partnership between them, and that the various articles of partnership were reduced to writing; but they were never signed, nor was the treaty ever completed; the respondent having declined entering into partnership for twelve months. There was, therefore, no general partnership between the parties, as was originally intended. But, in the second place, it is said, that the subsequent dealings of the parties were in accordance with the articles which had been drawn up; and to prove this, it is alleged, that the articles having provided that the trade should in future be carried on under the style and firm of "*B. and S. Vanderplank & Co.*," the bankrupts did thenceforth adopt and take upon themselves that description in carrying on their trade, expecting that this designation would afterwards include the respondent as a dormant partner; but I find no proof that this was done with the privity of the respondent, or in consequence of any understanding between him and the bankrupts. It is further stated, that an advance was made by the respondent to the bankrupts to the same amount, and in the same manner as were prescribed by the articles, with respect to the respondent's share of the capital of the intended co-partnership; and on this ground it is contended, that the transaction must be regarded as a part-

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nership dealing, and not as a loan or sale of goods. I find, however, that it was never so regarded by the parties themselves; but that, on the contrary, the bankrupts considered themselves as the debtors of the respondent, in respect of the advance in question, and consented to his recovering judgment against them upon it. And, although it is true that the judgment has since been set aside, yet this was not done on the ground that the debt was not due, but on legal grounds wholly irrespective of the question, whether the transaction was a partnership dealing or not. The remaining question is, whether the respondent held himself out to the world as a partner. Now the whole transaction is inconsistent with such a notion. One of the bankrupts admits, that the respondent refused to sign the articles, but says, that he considered the respondent as a partner, from his having advanced capital. This, however, was clearly an after thought, and neither of the bankrupts states one partnership act. But the greatest stress is laid by the petitioner upon the testimony of *Fletcher*, between whom and the respondent there seems to have existed a close intimacy and friendship, which is now turned into a bitter animosity. But even this testimony shows that the partnership was prospective only, and not actually in existence. On the whole, therefore, I am of opinion that there was no partnership, either secret or avowed, between the respondent and the bankrupts; and it is a satisfaction to me to find that the Commissioner has come to the same conclusion.

Petition dismissed with costs; assignees' costs to come out of the estate.

Mr. *J. Russell*, on the part of the assignees, now appeared in support of a petition to suspend the payment of the dividend, until the pending action at law against *Evill* was disposed of. He stated that it was standing for trial at the present sittings, in which the sole question would be partnership, or no partnership; that further evidence had been discovered, as to the existence of the partnership; and that there was a prospect of success in the action.

Mr. *Anderdon*, for the respondent, opposed the application.

Sir JOHN CROSS.—This is a singular application by an official assignee and his co-assignees, praying that the payment of a dividend may be suspended. As the petition impugns the former judgment of the Court as erroneous, I have thought it right to hear all that could be said upon the subject; for I should be extremely sorry, if it should be supposed that the Court was unwilling to reconsider any of its judgments, or was not ready at any time to retrace its steps, if justice required it. What are the facts to ground the present application? Mr. *Evill* had a large debt, which was disputed by the assignees, and decided on by the Commissioner, after the examination of the creditor and other persons in an elaborate investigation, which occupied two or three days; and it was then declared entitled to proof. The official assignee, it seems, differed in opinion with the Commissioner, alleged that his decision was wrong, and came foremost with a petition to this Court to expunge the proof. On the hearing of that petition, all the evidence that could be collected was adduced; and the Court, having duly

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The Court will not suspend the payment of a dividend, on the ground of a pending action against the creditor, in which it was sought to charge him as a partner with the bankrupt; after the very same question has been litigated by the petitioner, and decided upon by this Court.

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weighed all that was laid before it on the question of a partnership, was unable to arrive at the opinion so confidently maintained by the petitioner. There was nothing but the appearance, a mere *primâ facie* case, of partnership, which an examination of the facts removed; and a conclusion was arrived at by the Court, without any doubt or reservation upon the subject. An issue would have been directed by the Court, had such a course been more satisfactory to the parties; but it was declined, and the Court gave a decision on the merits of the case. The question now is, whether this Court will suspend the execution of its Order, until a trial has taken place, in which the question of partnership might or might not be involved; for it does not appear upon the pleadings. The Court cannot judicially take notice of such a prospective trial. Its judgment has been formed on the evidence brought before it by both parties after a full hearing, and it would not be justified in suspending the payment of a dividend, where no doubt existed as to the right of the creditor to make the proof. It is now proposed to deprive the respondent of the benefit of his proof, on vague suggestions, which the Court would be doing much injustice to be influenced by.

Petition dismissed with costs, to be allowed out of the estate.



Ex parte HOPTON.—In the matter of THOMAS REEVES  
and WILLIAM REEVES.

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*Serjeants' Inn  
Hall,  
July 29.*

AT the date of the fiat, the bankrupt, *Thomas Reeves*, held by parol of the petitioner, as tenant from year to year, two farms, at a rent of 595*l*. The assignees had permitted the bankrupt to continue in the possession of the farms; and the prayer of the present petition was, that they might elect under 6 *Geo. 4. c. 16. s. 75. (a)*, either to take or decline the leasehold interest of the bankrupt.

A parol lease is within 6 *Geo. 4. c. 16. s. 75.*

*Quære*, whether upon a petition under this section, the Court has jurisdiction to give the landlord his costs.

Mr. *J. Russell*, and Mr. *Dichenson*, for the petitioners. It is decided by the case of *Slack v. Sharpe (b)*, that a parol lease from year to year was within the provision of the 6 *Geo. 4. c. 16. s. 75*. In that case, Lord Chief Justice *Denman* said, "We have felt some doubt on a point, which has not been argued, *viz.* whether a parol contract be within this clause. We think, however, that the clause does comprehend the case, and that

(a) "And be it further enacted, that any bankrupt, entitled to any lease or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements, therein contained, and if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid; and if the assignees shall not, upon being thereto required, elect whether they will accept or decline such lease or agreement for a lease, the lessor, or person so agreeing as aforesaid, or any person entitled under such lessor or person so agreeing, shall be entitled to apply by petition to the Lord Chancellor, who may order them to elect and deliver up such lease or agreement, in case they shall decline the same, and the possession of the premises, or may make such other order therein as he shall think fit."

(b) 8 *Adol. & Ellis*, 366.

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the offer to deliver up possession is, in such a case, equivalent to a delivery of the lease or agreement;" and *Littledale J.* said, "I agree that this case is within section 75. The words, deliver up such lease or agreement, might indeed seem to contemplate some writing; still, considering that the clause is framed for the benefit of the tenant, I think the delivering up possession is delivering up the lease."

Mr. *Swanston*, and Mr. *Wood*, for the assignees. In *Ex parte Sutton (a)*, Lord *Eldon* decided, that a parol lease was not within the 49 Geo. 3. c. 121. s. 19., which corresponded with the 75th section of the present bankrupt act; but this case was not adverted to in *Slack v. Sharpe*, which circumstance, as well as the fact of the point not having been there argued, must very much weaken the authority of that case, for the purpose of overruling the case of *Ex parte Sutton (a)*.

Mr. *J. Russell*, in reply.

Sir JOHN CROSS.—I have no hesitation in saying, that although there is no written lease, the parol lease is within the meaning of the act. It is true, the clause speaks of a lease to be delivered up, but I think the meaning of that is, that if there be a lease, it shall be delivered up; and that if there is no lease, the delivery up of possession is sufficient. It would be extraordinary, if such a case as this were a *casus omissus* in the statute; for a parol lease for three years would be sufficient to give a legal interest for that term. The present lease is a lease from year to year, and by operation of law it has

(a) 2 Rose, 86.

come to the assignees, who have a right to reject or take it; but for them to stand aloof, and neither say whether they will reject or take it, is very unjust to the landlord; nor can they be permitted to stand by, until they see what will be the nature of the crops,—so as to take the lease if they are good, and reject it if they are bad. I think the petitioner is entitled to the Order which he prays.

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Mr. *Russell*, then asked for costs.

Mr. *Swanston*, for the assignees. It was decided in *Ex parte Bright (a)*, that the Court had no jurisdiction to make an Order for costs in such a case as the present; the statute not having subjected the bankrupt's estate to the payment of the landlord's costs.

Sir JOHN CROSS.—It is a very important question, whether the Court has not a general jurisdiction to award costs between the parties litigant before it; but, without saying whether in this case it has such jurisdiction or not, I do not think it expedient to give costs; and I therefore make no Order on the subject.

ORDERED as prayed, assignees to elect in fourteen days, and to take their costs out of the estate.

(a) 2 G. & J. 79.



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Westminster,  
November 3.

Assignees under a separate fiat ordered to produce the proceedings under that fiat at the opening of a joint fiat against the same bankrupt and his partners, for the purpose of proving the act of bankruptcy; although the Commissioners had declined to order the proceedings to be produced.

Ex parte SHARP.—In the matter of SAMUEL CHADWICK, JAMES CHADWICK, and JOHN CHADWICK.

THIS was a joint fiat, under which no adjudication had taken place, for want of proof that an act of bankruptcy had been committed by one of the partners. A separate fiat had however previously issued against this partner, under which he had been found a bankrupt, and assignees had been appointed. The petitioning creditor, who had sued out the joint fiat, now presented his petition, praying that the assignees under the separate fiat might be ordered to produce the proceedings under that fiat, and that the petitioner might be at liberty to inspect and take copies of them, or of so much of them as related to the act of bankruptcy committed by *Samuel Chadwick*; or that the petitioning creditors, or the assignees, under the separate fiat might be ordered to communicate, upon affidavit, the name, residence and description of the person or persons by whom such act of bankruptcy was proved, and the nature and date of such act of bankruptcy, and in whose custody were any written documents used in evidence for that purpose. The separate fiat was issued on the 19th of July 1841, and the joint fiat on the 7th of August; and both were directed to the same Commissioners. A meeting of the Commissioners was held on the 26th of August, and another was held on the 3rd of September, for the purpose of opening the joint fiat. At the latter of these meetings, the Commissioners expressed themselves to be ready to adjudicate on an act of bankruptcy being found to have been committed by *Samuel Chadwick*, that being the only point on which they required evidence. Another meeting was conse-

quently held, when the solicitors and one of the assignees under the separate fiat attended with the proceedings under that fiat, but submitted that they were not bound to produce these proceedings, or to answer any questions as to the act of bankruptcy on which the separate fiat had issued, and refused to do so, unless the Commissioners decided that they were bound to make these disclosures. The Commissioner having declined to come to such a decision, the present petition was presented; orders for enlarging the time for opening the fiat having been from time to time obtained.

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Mr. *Anderdon*, in support of the petition. This case is exactly the same as *Ex parte Harrison* (a), where an order was made in the terms of the prayer of this petition.

Mr. *J. Russell*, *contra*. That case was an exception to the general rule; the relief sought is an extraordinary indulgence, and very special circumstances must be made out to induce the Court to grant it. In *Ex parte Burdekin* (b), an application by a petitioning creditor, who had sued out a joint fiat, for liberty to inspect the proceedings under a separate one, was refused; although the ground on which it was asked was, that the witness who had proved the act of bankruptcy under the separate fiat, and who was the only one who could prove it, was purposely kept out of the way. In *Ex parte Harrison* (a) the Commissioners were divided in opinion, as to the propriety of disclosing the proceedings under the separate fiat to the petitioning creditor who had sued out the joint fiat; but here the Commissioners agreed in declining to exercise the jurisdiction which they have

(a) 2 Gl. & J. 135. (b) 1 Dea. 57.



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under the 24th section of the general act(a), by calling on the assignees to make the disclosure sought by the present petitioner. Their discretion, as to the exercise of the jurisdiction conferred by this section, could not have been controlled by the Lord Chancellor, and cannot now be controlled by this Court. They are besides in a better condition than this Court can be in, for the purpose of judging of the propriety of acceding to such an application; and if, as we believe to be the case here, they declined doing so, because the act of bankruptcy on which the separate fiat was issued could not, by reason of concert or otherwise, be taken advantage of by the creditor who sued out the joint fiat, it would be very inconvenient for this Court to interfere, if it had power to do so, by directing an unnecessary and useless disclosure of the proceedings under the other fiat. And he cited Montagu and Ayrton's Bankrupt Law, vol. 1, p. 523(b).

Mr. *Swanston*, in reply, was stopped by the Court.

Sir JOHN CROSS.—In *Ex parte Harrison* (c) Lord

(a) 6 *Geo. 4*, c. 16, s. 24. "And be it enacted that it shall be lawful for the Commissioners, after they shall have taken such oath as aforesaid, by writing under their hands, to summon before them any person whom they shall believe capable of giving information concerning the trading of, or any act or acts of bankruptcy committed by, the person or persons against whom such commission is issued, and also to require any person so summoned to produce any books, papers, deeds and writings and other documents in the custody, possession, or power of such person, which may appear to the said commissioners to be necessary to establish such trading or act or acts of bankruptcy; and it shall be lawful for the said commissioners to examine any such person upon oath by word of mouth, or interrogatories in writing, concerning the trade of, or any act or acts of bankruptcy committed by, the person or persons against whom such commission shall have issued."

(b) See *Ex parte Stone*, 1 Gl. & J. 7, there referred to.

(c) 2 Gl. & J. 135.

*Eldon* said, "all the requisites have been proved under this joint commission, except the act of bankruptcy against *Groves*, who had recently, as the petitioner knew, been proved to have committed an act of bankruptcy under the separate commission. If two separate commissions had been taken out, they must both have gone ; but where there is a joint and a separate commission, I will order that to be prosecuted which will be least expensive, and yet attended with the most beneficial effects to the creditors. If the petitioning creditor under the separate commission refuse to bring forward the same evidence which he then produced as to the act of bankruptcy, let the proceedings under such commission be exhibited for the purpose of adopting the act of bankruptcy proved upon that occasion." Lord *Eldon* therefore thought that the Commissioners were bound to take notice of the act of bankruptcy, which had been established before them under the separate fiat. And in the present case, for any thing that appears to the contrary, they might have adjudicated on the joint fiat, if they had looked, as they ought to have done, at the proceedings under the separate fiat. I think that this case is precisely similar to that on which we have Lord *Eldon's* deliberate judgment, and that the Order must be made as prayed.

Mr. *Russell* then asked that the petitioner might pay the assignees' costs, as had been ordered in *Ex parte Harrison*; but

The COURT ordered the costs of both parties to be paid out of the joint estate.

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1. A consignment is made by one firm to another through a third, who make an advance to the first, on an agreement for a lien upon the return proceeds. The proceeds are accordingly remitted to them; but before their arrival, the consignors have dissolved partnership, and separate fiats have issued against each of them. By the dissolution deed it is agreed, that a certain portion of the partnership credits should belong to, and a certain portion of the partnership debts should be paid by, one of the partners; to whom, in pursuance of this agreement, the assignee of the other partner transfers all his interest in the above-mentioned return proceeds. *Held*, that this interest constituted separate, and not joint, estate.

2. A small debt of 1*l.* 14*s.* 6*d.*, due to the above firm before its dissolution, held, under the circumstances of the case, not joint property, for the purpose of preventing a joint creditor from receiving dividends out of the separate estate.

Ex parte THOMAS HORNBY BIRLEY.—In the matter of  
ADOLPHUS KRAUSS.

THIS case, which is reported *ante*, vol. i. p. 387, now came on to be heard on further directions, on the report of the Commissioners.

Mr. *J. Russell*, for the petitioner. By the Commissioners' certificate there appear to be three items, all of which are clearly partnership assets. It is, however, sufficient for the petitioner's case, if any one of them appears to be joint estate. Now the second of these items consists of two debts, which have not ceased to be the property of the firm of *Makinson* and *Krauss*. They arose under these circumstances: *Makinson* and *Krauss* had consigned to a house at *Rio*, through another firm, certain goods, which were sold at *Rio*, and the proceeds of which it was agreed should be remitted to *Makinson* and *Krauss*, through the same firm through whom the goods had been consigned, and who had a lien upon them for advances to *Makinson* and *Krauss*. The remittances were accordingly made to that firm, but arrived after the fiat had issued against *Krauss*. Now it is not shown, that this firm ever had notice of the deed of dissolution between *Makinson* and *Krauss*; and even if they had, still the return proceeds would only become separate property under the terms of that instrument, after *Krauss* had fulfilled his part of the contract, by paying his share of the debts. The legal title remained in the partnership, notwithstanding the deed

of dissolution; and the partnership credits could only be claimed by one of the partners, upon his paying the debts of the concern. But if the case were doubtful upon the first two items mentioned in the Commissioners' certificate, the third, although small in amount, being a debt of 1*l.* 14*s.* 6*d.* only, would be sufficient to support the case of the petitioner. Joint creditors are not permitted to prove against the separate estate, where there is joint property, however trifling in amount; *Ex parte Peake* (a). It is not pretended, that the debtor from whom this amount is due is insolvent; the statement being, merely, that when applied to he said, he had not the money about him.

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Mr. *Bacon*, and Mr. *Fitzherbert*, for Messrs. *Wood* and *Walker*, the respondents. With regard to the second item mentioned in the Commissioners' certificate,—it appears, that the assignee under *Makinson's* bankruptcy had transferred to *Krauss* all *Makinson's* interest in the return proceeds on the shipments to *Rio*. This transaction is, therefore, sufficient to constitute those proceeds separate estate, even if there were any reasonable doubt as to the operation of the deed of dissolution. It would be impossible for the joint creditors to recover those proceeds as joint estate. The deed of dissolution is not merely an executory instrument; it purports to be an actual transfer, in consideration of certain covenants and agreements. Then, as to the remaining item; the trifling debt of 1*l.* 14*s.* 6*d.* cannot be considered joint estate, so as to defeat the right of the creditor to resort to the separate estate. For, in the first place, the considerations already adverted to apply as much to this, as

(a) 2 Rose, 54.

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they do to the former items ; and in the next place it appears, that the debtor, on being applied to by the assignee of *Krauss* for payment of the debt, merely stated his inability to pay at that time, without objecting that the debt was a joint one. He must, therefore, be considered as not only having notice of, but as acquiescing in, the arrangements made upon the dissolution. It is evident, however, that the payment of so small a sum cannot, in practice, be enforced by the assignees. In *Ex parte Peake* (a), the case was different ; for there it was admitted, that the joint effects were of a certain value, viz. 1*l.* 11*s.* 6*d.* ; and the Lord Chancellor there said, “ If in point of fact there is a joint property, whether to the amount of 5*l.* or 5*s.*, it is an answer to this application. Convenience requires that the established practice of the Court should be understood and adhered to. If the property alleged to exist in this instance be of such a nature, and in such a situation, that any attempt to bring it within the reach of the joint creditors must be deemed a desperate, or in point of expense, an unwarrantable attempt, that would authorize a departure from the rule. In truth, there would then be no joint property.” The latter part of these observations are exactly applicable to the present case.

November 4. Mr. *Russell*, in reply.

Sir JOHN CROSS held, that there did not appear, from the Commissioners' certificate, to be any thing that could properly be considered the joint estate of *Makinson* and *Krauss*, and dismissed the petition ; ordering the assignee to pay the costs of the respondent, and to take those costs, as well as his own, out of the estate.

(a) 2 Rose, 54.

The petition of WILLIAM MORLEY BURNETT and JOHN BOYD.—In the matter of EDWARD BLAKE.

SPECIAL CASE.

THIS was an appeal from the decision of the Court of Review in *Ex parte Burnett*, reported, *ante*, vol. 1, p. 608. The special case, after setting out *verbatim* the petition to the effect stated in the former report, proceeded as follows :

“ The petition came on to be heard at Serjeants’ Inn Hall on the 16th day of March 1841, and the Court, having heard Mr. *Swanston*, Mr. *Girdlestone*, and Mr. *Teed*, as counsel for the petitioners, and Mr. *Bethell*, and Mr. *Russell*, as counsel for the assignees, found all the allegations of the petition to be true in matter of fact. And it was thereupon contended, on the part of the petitioners, that, being also the petitioning creditors by whom the fiat was sued out, they were entitled to have their proof admitted against the separate estate of the bankrupt, as well for their joint debt, as for their separate debt. Nevertheless the Court declared and adjudged that the petitioners were entitled to be admitted as creditors against the separate estate for their separate debt only, and not for their joint debt also, and dismissed the petition ; whereupon the learned counsel for the petitioners have submitted that the said judgment is erroneous in matter of law, and have applied for this special case, to which the learned counsel for the assignees have requested the following documents may be annexed.

“ The affidavit of the petitioning creditor, on striking the docket, was as follows :—‘ *William Morley Burnett*, of Skinner Street, in the city of London, draper, maketh

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1841, April 23,  
and May 9,  
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*Coram Lord*  
*Lyndhurst, C.*

The rule that a joint creditor suing out a separate fiat shall receive dividends on his joint debt out of the separate estate, *pari passu* with the separate creditors, applies to a case, where, besides the joint debt, there is due to the joint creditor from the bankrupt a separate debt of sufficient amount to support a fiat.

The point having been decided against the creditor by the Commissioners, and by the Court of Review ; *Held*, that he was not entitled to costs.

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oath, that *Edward Blake*, of Devonport, in the county of Devon, draper, dealer and chapman, is justly and truly indebted to this deponent, and to *John Boyd*, his copartner, in the sum of one hundred pounds and upwards; and this deponent further saith, that the said *Edward Blake* has become bankrupt within the true intent and meaning of some or one of the statutes in force concerning bankrupts, as this deponent believes, and that the fiat of bankruptcy sought to be issued against him, when obtained, is intended to be executed at Devonport, or within ten miles of the same, and not within forty miles of London.'

"The deposition (a) tendered to the Commissioners, on opening the fiat, was as follows:—'*William Morley Burnett*, of Skinner Street, in the city of London, wholesale draper, being sworn and examined on the day and year and at the place aforesaid, upon his oath saith, that *Edward Blake*, lately trading under the firm or style of *Edward Blake* and Company, the person against whom a fiat in bankruptcy hath been lately awarded and issued, was, together with *William Blake* his former copartner in trade, at and before the date and issuing of the said fiat, and still is, together with the said *William Blake*, justly and truly indebted to this deponent and to *John Boyd*, his present copartner in trade, as surviving partners of *William Clark Boyd*, deceased, in the sum of 4390*l.* 13*s.* 6*d.*, as the surviving payees of a certain promissory note for 4500*l.*, with interest at five per cent. per annum from the 1st day of

(a) This deposition, which was tendered by the petitioning creditor to establish his debt at the opening of the fiat, contained the particulars of all his debts, both joint and separate. But the deposition which follows, and which merely speaks to a separate debt of 289*l.* 6*s.* 5*d.*, was substituted for the above deposition by the direction of the Commissioners. See the former report of the case, *ante*, vol. 1. p. 610.

January 1838, made by the said *Edward Blake* and *William Blake*, his then copartner in trade, dated the 1st day of June 1837, and payable on demand; the consideration for which said note was goods previously sold and delivered to the said *Edward Blake* and *William Blake*, at their request, the sum of 109*l.* 6*s.* 6*d.*, hereinafter mentioned, having been, at the request of the said *Edward Blake*, carried to the credit of the said note in part payment thereof; and also in the further sum of 124*l.* 6*s.* 9*d.*, being the balance of interest due upon the said note to the 23d day of July 1840; and also that he the said *Edward Blake*, lately trading as aforesaid, was, at and before the date and issuing of the said fiat, and still is justly indebted to this deponent and to *John Boyd* in the sum of 289*l.* 6*s.* 4*d.* for goods sold and delivered during this year by this deponent and the said *John Boyd* to the said *Edward Blake*, after deducting the sum of 4*l.* 15*s.* 2*d.* hereinafter mentioned, and the sum of 6*l.* 15*s.* 5*d.* as the balance of rent account, due to the said *Edward Blake*; and also that he the said *Edward Blake*, lately trading as aforesaid, was, at and before the date and issuing of the fiat, and still is justly and truly indebted to this deponent and to the said *John Boyd*, his said copartner, trading as aforesaid, in the sum of 175*l.* 12*s.*, as the indorsees of the third bill of exchange hereinafter particularly mentioned, which lately became due and was dishonoured, and notice was given to the said *Edward Blake* of such dishonour, the consideration for which said bill, together with another bill of exchange for 138*l.* 7*s.*, which has been paid, having been the sum of 200*l.* paid by this deponent and his said copartner *John Boyd* to the said *Edward Blake*, at his request, on the discounting of the said two bills, and, after deducting 4*l.* 12*s.* 6*d.* for interest on the said two bills from the

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31st March last to the time when the same bills would respectively become due, the balance of 109*l.* 6*s.* 6*d.* was carried to the credit of the said note for 4500*l.* hereinbefore mentioned, in part payment thereof, by the direction and at the request of the said *Edward Blake*; and also in the further sum of 394*l.* 14*s.*, as the indorsees of the fourth and fifth bills of exchange hereinafter particularly mentioned, the consideration for which last mentioned bills having been a bill of exchange drawn by or on behalf of this deponent and the said *John Boyd*, under the firm of *Boyd, Burnett, and Boyd*, and accepted by the said *Edward Blake* for the sum of 228*l.* 13*s.* for one year's interest on the said note for 4500*l.*, due the 1st day of January 1840, amounting to 225*l.*, and four months' interest on the said sum of 225*l.*, amounting to 3*l.* 13*s.*, and which last mentioned bill became due on the 4th day of May last, and was dishonoured, and the sum of 158*l.* 3*s.* paid by this deponent and his said copartner to the said *Edward Blake*; and also in the further sum of 183*l.* 6*s.*, as the indorsees of the sixth bill of exchange hereinafter particularly mentioned, the consideration for which last mentioned bill having been the sum of 179*l.* 13*s.*, paid by this deponent and his said copartner *John Boyd* to the said *Edward Blake*; and also in the further sum of 297*l.* 16*s.*, as the indorsees of the seventh and eighth bills of exchange hereinafter particularly mentioned, the consideration for which last mentioned bills having been the sum of 292*l.* 4*s.* paid by this deponent and his said copartner *John Boyd* to the said *Edward Blake*; and also in the further sum of 362*l.* 1*s.* as the indorsees of the ninth and tenth bills of exchange hereinafter particularly mentioned, the consideration for which last mentioned bills having been the sum of 350*l.* paid by this deponent and

his said copartner *John Boyd* to the said *Edward Blake*; and this deponent further saith, that after deducting 7*l.* 5*s.* 10*d.* for interest on the said last mentioned bills to the time they would become due, there remained in the possession of this deponent and his said copartner *John Boyd* the sum of 4*l.* 15*s.* 2*d.*, ready to be paid to the said *Edward Blake* on demand; and that no demand having been made, the said sum of 4*l.* 15*s.* 2*d.* hath been deducted from the amount due to this deponent and his said copartner *John Boyd* for goods, as hereinbefore mentioned; for which said respective sums of 439*l.* 13*s.* 6*d.*, 124*l.* 6*s.* 9*d.*, 289*l.* 6*s.* 4*d.*, 174*l.* 12*s.*, 395*l.* 14*s.*, 183*l.* 6*s.*, 297*l.* 16*s.*, and 362*l.* 1*s.*, making together the sum of 6217*l.* 15*s.* 7*d.*, this deponent hath not, nor hath the said *John Boyd*, nor did the said *William Clark Boyd* in his lifetime, to the knowledge or belief of this deponent, nor hath any other person or persons, for their or any or either of their use, to the knowledge or belief of this deponent, received any satisfaction or security, save and except the promissory notes and bills of exchange hereinafter particularly mentioned, and also save and except 250 shares or scrip in the Wheal Prosper China Clay and Tin Mine, which were redelivered or sent in or about the month of October 1838 to the said *Edward Blake* and *William Blake*, and which shares were on or about the 23d day of March 1839 assigned or purported to be assigned by the said *Edward Blake* and *William Blake* to this deponent and his said copartner *John Boyd*, so carrying on trade as aforesaid, and which shares were then said to be held on the behalf of the said *Edward Blake* and *William Blake* by Messrs. *Nevill* and *Frankland*, merchants, Liverpool, aforesaid, and such shares or scrip, or part thereof, are now in the possession of *John*

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Frankland, of Liverpool, aforesaid; and also save and except an assignment, or what purports to be an assignment, of the sum of 700*l.*, to which the said *Edward Blake* and *William Blake* would be, or claimed to be, entitled at the transfer of a set of shares in the Wheal Wellington Mine, having sold the same to Messrs. *Nennis* and Co., such sum to be handed over to this deponent and his said copartner *John Boyd* (trading as aforesaid) when received; and, as deponent has been informed, notice of such assignment of the said sum hath been given to the said Mr. *Nennis*.'

"And the following is a copy of the deposition of the petitioning creditor, filed among the proceedings:

' At Weekly's Hotel, in Devonport, in the county of Devon,
 20th of August 1840.

' In the matter of *Edward Blake*, of Devonport, in the county of Devon, draper, dealer and chapman.

' *William Morley Burnett*, of Skinner Street, in the city of London, wholesale draper, being sworn and examined on the day and year and at the place above named, upon his oath saith, that *Edward Blake*, lately trading under the firm or style of *Edward Blake* and Company, the person against whom a fiat in bankruptcy hath been lately awarded and issued, and is now in prosecution, was, at and before the date and issuing of the said fiat, and still is justly and truly indebted unto this deponent and to *John Boyd*, his copartner in trade, in the sum of 289*l.* 6*s.* 4*d.* on the balance of account for goods sold and delivered during the present year by this deponent and his said copartner *John Boyd*, trading under the firm of *Boyd, Burnett, and Boyd*, to the said *Edward Blake*, and at his request; for which said sum of 289*l.* 6*s.* 5*d.*, this deponent hath not, nor hath the said *John Boyd*, to the knowledge or belief of this deponent,

nor hath any other person or persons for their or either of their use, to the knowledge or belief of this deponent, received any security or satisfaction whatsoever, save and except the undermentioned bills of exchange."

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Mr. *Swanston*, Mr. *Girdlestone*, and Mr. *Edward Teed*, appeared for the appellants. Their arguments were, in substance, the same as were urged on behalf of the appellants in the Court below.

Mr. *Bethell*, for the respondents. The right contended for on the other side is an exception to the general rule; and the reason of that exception being introduced was, that suing out a fiat amounted to an election to proceed under the bankruptcy only. Here the reason does not apply, as the petitioning creditor has not lost his other remedy for the recovery of the joint debt. [*Lord Chancellor*.—Could he proceed at law upon it?] It has never been decided that he could not. He does not, by suing out the fiat, abandon his right to sue the co-debtor, as a petitioning creditor does who has only the joint debt due to him. On the contrary, his remedy against the co-debtor remains intact; as he is at liberty to ascribe the fiat to his separate debt; *Heath v. Hall*(a). It appears, therefore, that the remedies in respect of the joint debt have not been prejudiced, nor have the joint creditors received any advantage from that debt. There is no reason, therefore, why that debt should be proved against the joint estate. And he cited the authorities referred to in his former argument.

Mr. *Girdlestone*, in reply.

(a) 4 Taunt. 326.

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 April 23.

Lord CHANCELLOR.—The petitioners in this case are creditors of *Edward Blake* and *William Blake*, to a large amount; to the amount, I think, of about 4000*l.* and upwards; they were also creditors of *Edward Blake* to the amount of between 200*l.* and 300*l.*; and they sued out a separate fiat against *Edward Blake*; and the question is, whether under that separate fiat against *Edward Blake* they are entitled to prove their joint debt, and to receive dividends in competition with the separate creditors. Now the rule is general, that where a joint creditor sues out a separate fiat, he is entitled in respect of his joint debt to prove against the separate estate, in competition with the separate creditors. He is upon an equal footing with the separate creditors.

That is the general rule; but it is urged, that in this case there is an exception,—that the separate debt is sufficient to support the fiat, and therefore the petitioners have no right to prove their joint debt and receive dividends on such proof from the separate estate, in competition with the separate creditors. I do not find in any text writers, nor do I find in any reported case, a hint of any such exception; and as this state of circumstances must have frequently occurred, it appears to me, that that affords strong evidence of the opinion of the profession with respect to this matter; because, as the rule is general, it is almost impossible to suppose that any party would have abandoned his right to prove, without obtaining the judgment of a Court on the subject. The silence, therefore, of all reports and text writers upon this point leads me to the conclusion, that the opinion of the profession has been adverse to any such supposed exception.

But the case does not rest entirely on this; for, upon

principle, it appears to me, that the fiat is supported by the whole debt. It is supported by the separate debt, and by the joint debt. The one supports the fiat as much as the other. If a proof of the separate debt fails, so as not to be sufficient to maintain the fiat, the fiat is supported by the joint debt. If a part of the joint debt fails, so as not to be sufficient to support the fiat, the fiat is supported by the separate debt. The creditors have a right to rest upon both, for the purpose of supporting the fiat. It does not appear to me, therefore, that in principle there is any ground to support this exception.

But further still, the petitioning creditor, having a joint debt, is upon a less advantageous footing than the other joint creditors, unless he is allowed to prove against the separate estate. Other joint creditors, in respect of a joint debt, may sue the bankrupt and his co-debtor at law; the petitioning creditor cannot do this; he is considered as having conclusively made his election not to proceed at law; and the utmost that was contended for at the bar was this, that in the event of any deficiency, he would have a right to proceed against his co-debtor; but the co-debtor may then have no funds,—he may be unable to pay,—he may be entirely insolvent; and, therefore, unless the petitioning creditor, who is precluded from proceeding against the bankrupt at law, has a right to proceed against the separate estate, he is in a worse position than the other joint creditors.

Again, previously to the 49 *Geo. 3. c. 121.*, how did the matter stand with respect to petitioning creditors and other creditors? An ordinary creditor, if he had distinct demands, might prove under the commission for one demand, and he might proceed at law for another, as in

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Botterill's case (a), and the other cases of that description in *Montagu*; but the petitioning creditor had no right to do this, if he had two distinct demands. Having conclusively made his election, he had no right to proceed at law on either of them. Even supposing one were sufficient to support the commission,—with respect to the other, he was considered as having conclusively made his election, and had no right whatever to proceed at law; therefore the circumstance of the separate debt being sufficient to support the commission, appears to me to have no decisive bearing on the subject.

For these reasons, I am of opinion that the general rule must prevail; that this supposed exception is not warranted by any principle, and certainly not warranted by any decided case; and therefore that the judgment of the Court of Review must be reversed.

May 9.

This case coming on this day, to be spoken to as to costs,

Mr. *Girdlestone*, for the appellants, asked for the costs incurred by them in all the proceedings, arising out of the question decided in this case. It is only reasonable, that a creditor who establishes a claim should be indemnified out of the fund, in which he has shown himself entitled to participate, and for the benefit of which, the unsuccessful resistance to his claim was made. In a creditors' suit in chancery, a creditor is allowed his expenses of proving his debt. Cases of this description cannot be governed by the same principles, as those which are applicable where the question is between party and party. If they were, it would be impracticable to obtain a dividend on a small claim, upon which

(a) 1 Atk. 109.

any question might be raised. [Lord Chancellor. You ask to be paid your expenses, not only out of your share of the fund, but out of the shares belonging to other creditors, who have nothing to do with the question affecting your claim.] I submit, that the costs are expenses necessarily incurred in the administration of the general estate, out of which they ought consequently to be defrayed. In *Ex parte Hooper* (a), Sir John Cross lays it down, that the rule stated to be a general one in *Ex parte Millington* (b), viz., that costs cannot be given to a party succeeding against the decision of the Commissioners, where they have exercised their jurisdiction, would not be obligatory on the Court on future occasions. And in *Ex parte Fisk* (c), your lordship said, that although it was hard that the estate should bear the expense of an erroneous decision of the Commissioners, yet it would be equally hard that the creditor should bear the costs, when his attempt to prove was stopped *in limine*; and your lordship there directed all the costs to be paid out of the estate.

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Mr. Bethell, *contra*. In that case, the Commissioners refused to enter into an examination of the proof, which is the exceptional case referred to by Sir George Rose in his judgment in *Ex parte Hooper* (d). The only cases, in which a party succeeding against the decision of the Commissioners is allowed his costs, are, where the Court of appeal thinks his right indisputable. [Lord Chancellor. That cannot be said in the present case.] Or where the Commissioners have refused to go into the

(a) 1 M. & A. 403; 3 Deac. & C. 665; and see *Ex parte Brookes*, 2 M. & A. 78.

(b) 1 M. & A. 114; 3 Deac. & C. 298.

(c) Mont. & M'A. 93.

(d) 1 M. & A. 404.

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question. The present case falls within neither of these descriptions.

LORD CHANCELLOR.—I cannot give the appellant his costs. The point in dispute was one of great nicety.

In the matter of ROBERT CALDECOTT, a bankrupt.—On the petition of ALEXANDER DAVIDSON, the registered officer of a copartnership, called “The Commercial Bank of England.”

Westminster,
Nov. 4,
coram Lord
Lyndhurst, C.

THIS was an appeal from a decision of the Court of Review (a) on the following

SPECIAL CASE.

A member of a joint stock banking company kept an account with them as his bankers, and at the time of his bankruptcy was indebted to them in a large balance on such banking account, the company being also considerably indebted to various other persons. Held, that the company had a right of proof against the bankrupt, for the balance due on such banking account.

The petition states, that on the 7th day of August 1840, a fiat in bankruptcy was awarded and issued against *Robert Caldecott*, by the name and description of *Robert Caldecott*, of the city and county of Chester, draper and mercer, dealer and chapman, who was thereupon duly found and declared a bankrupt; and on the 24th day of September 1840, *Richard Growcock*, of Bow Church Yard, in the city of London, lace manufacturer, and *Robert Spence*, of Love Lane, in the city of London, warehouseman, were duly appointed and now are the assignees of the estate and effects of the said bankrupt. The said copartnership, carrying on business as aforesaid under the name, title or firm of the Commercial Bank of England, is a copartnership of bankers, constituted under the provisions of an act made and passed in the seventh year of the reign of his late majesty King *George the Fourth*, intituled “An Act for the better regulating of Copartnerships of certain Bankers in

(a) See *Ex parte Davidson*, ante, vol. i. p. 648.

England, and for Amending so much of an Act of the Thirty-ninth and Fortieth years of the reign of his late Majesty King *George* the Third, intituled an Act for establishing an Agreement with the Governor and Company of the Bank of England, for advancing the sum of Three Millions, towards the Supply for the Service of the year 1800, as relates to the same." And *Alexander Davidson* was, upon and long prior to the 22nd day of January 1841, and still is, a member of such copartnership, resident in England, and had then been duly appointed and registered, and still is a public officer of such copartnership, in whose name the said copartnership then might, and still may sue and be sued, in pursuance of the provisions of the said act of parliament of the seventh year of the said King *George* the Fourth.

The bankrupt, *Robert Caldecott*, was also, at the date and issuing forth of the said fiat, and had been for upwards of two years, a member of the said copartnership called the Commercial Bank of England; and his name, as a member of the said copartnership, was entered in the returns made by the said copartnership, and filed and registered at the stamp-office, in compliance with the requisition of the said act of parliament. The said copartnership called the Commercial Bank of England had, for some time prior to the bankruptcy of the said *Robert Caldecott*, carried on business as aforesaid at the city of Chester, and at other places; and the said *Robert Caldecott* had a banking account with them at Chester, and he was, at the date and issuing forth of the said fiat, justly and truly indebted to the said copartnership, upon the balance of his said banking account, for money lent, commission, interest, and other

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usual banking charges, in the sum of 2137*l.* 17*s.* 8*d.* At the date and issuing forth of the said fiat, the said copartnership, and the members thereof as such copartners, were indebted to divers persons in divers large sums of money; and divers of the said debts are still unsatisfied, and remain due and owing from the said copartnership.

A meeting of the Commissioners, acting under the said fiat, was duly held on the 22nd day of January 1841, for the purpose of auditing the accounts of the assignees, and making a dividend of the estate and effects of the said bankrupt, and for receiving the proof of the debts of such of the creditors of the said bankrupt as had not already proved their debts under the said fiat; and, the debt owing by the said bankrupt to the said copartnership called the Commercial Bank of England not having been proved, the said *Alexander Davidson* attended the said meeting, and applied to prove the said last-mentioned debt; but the said *Alexander Davidson's* application was opposed by the said assignees, on the ground that the said bankrupt having, at the time of his bankruptcy, been a member of the said copartnership called the Commercial Bank of England, the proof could not be admitted, until the accounts of the said Commercial Bank of England had been taken, and the debts of the copartnership paid, and the affairs thereof wound up,—or, at least, until all the debts which were due and owing from the said copartnership, at the date of the said fiat, were paid and satisfied; whereas the said *Alexander Davidson* insisted, that under the provisions of an act of parliament, made and passed in the first and second years of the reign of her present Majesty, intituled “An Act to amend, until the

end of the next Session of Parliament, the Law relative to legal Proceedings by certain Joint Stock Banking Companies, against their own Members, and by such Members against the Companies,"—and under the provisions of another act of parliament, made and passed in the third and fourth years of the reign of her said present Majesty, intituled "An Act to continue, until the 31st day of August 1842, the provisions of an Act of the first and second years of her present Majesty, relating to legal Proceedings by certain Joint Stock Banking Companies against their own Members, and by such Members against the Companies,"—the said *Alexander Davidson*, as such public officer as aforesaid, was then immediately entitled to prove the debt due to the said Commercial Bank of England from the said bankrupt, and to receive dividends thereon rateably with the other creditors of the said bankrupt. Nevertheless the said Commissioners acting under the said fiat, were of opinion, that the provisions of the said two last mentioned acts of parliament did not entitle the said *Alexander Davidson* to prove the said debt, and they rejected the proof tendered by the said *Alexander Davidson* as aforesaid.

The petitioner, being aggrieved by the decision of the Commissioners, presented his petition to the Court of Review, praying, amongst other things, that he might be at liberty to call a meeting of the Commissioners acting under the said fiat, in order that he might immediately prove under the said fiat the said debt owing from the estate of the said bankrupt to the said Commercial Bank of England; and that the said Commissioners might be directed to admit such proof accordingly; and that the costs of and incident to the said

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application might be paid out of the estate of the said bankrupt.

The petition came on to be heard by the Court of Review, on the 23rd day of March last; and on the 29th day of March following, the Court, having found that the allegations contained in the petition were true in matter of fact, did thereupon declare and adjudge that the petitioner was duly entitled to be admitted a creditor in respect of the said debt, and made an Order to that effect, as prayed, giving the petitioner the costs of the application.

The counsel for the assignees submit, that the said judgment is erroneous in matter of law, in this, that the petitioner is not by law entitled to be admitted a creditor in respect of the said debt; and they have therefore applied for this special case.

Mr. *Swanston*, for the assignees. The public officer of the company could not prove against the estate of one of the members, unless he is enabled to do so by the 1 & 2 Vict. c. 96(a). Now there are no express words in the statute to that effect, and the construction contended for must therefore be founded merely upon inference. It is remarkable, that all the general provisions of the act seem to assume solvency on the part of the member of the company, against whom proceedings are to be taken; and it would be very singular, supposing the legislature to have intended to provide for the case of his insolvency, that so important a provision should be introduced, without express words, or words leading to an irresistible inference to that effect. There is, however, nothing to show that the legislature intended to include this case within the scope of the measure. In-

(a) Continued by 2 & 3 Vict. c. 68; 3 & 4 Vict. c. 111.

deed the 4th section seems to lead to a contrary conclusion; for it provides, that the partner's interest in the stock of the company shall not be set off against the demand made by the company upon him; a provision, which does not seem at all to contemplate the case of the administration of a partner's estate under a fiat. [Lord Chancellor. This provision was necessary; for the former sections had only provided, that proceedings might be taken by the company against the partner, as if he were a stranger; which would not have been sufficient to answer the purposes of the act, without taking away the right of set off.]

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Mr. *Richards*, Mr. *Anderdon*, and Mr. *Little*, for the respondents. The 7 Geo. 4. c. 46. comprehends, by express words, proceedings in bankruptcy, and the 1 & 2 Vict., which was made in *pari materiâ*, provides that every person, being or having been a member of a banking company, shall be liable to be proceeded against for the benefit of the company by its public officer. The words, "proceeded against," must be taken to apply to such proceedings, as are within the scope of the former act,—that is to say, to proceedings in bankruptcy among others.

Mr. *Swanston*, in reply.

LORD CHANCELLOR.—It having been found impossible to conduct proceedings relating to joint stock banking companies, consistently with the ordinary rules of law and equity, it became necessary for the legislature to interfere, by introducing some new rules with respect to these associations. The policy of the acts which have been

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passed for this purpose, as is to be collected from the language in which they are expressed, was this: to put the partnerships, and the individual members of them, as regards all suits and proceedings in Courts of law and equity, upon a footing different from that of ordinary partnerships, by rendering the members liable to be sued by the entire body; and when a suit is instituted of this description, a particular partner is not allowed to set off a demand of his own against the partnership. It appears to me, not only from the spirit, intent, and principle, but from the language itself of the statutes 7 Geo. 4. c. 46. and 1 & 2 Vict. c. 96., that the very case now before the Court is provided for, and included in the words of those enactments. I take it for granted, that the acts are in *pari materia*, and that the latter was meant to confirm and give full effect to the former. Now what does the 7 Geo. 4. c. 46. s. 9. provide? Why, that all actions and suits, and also all petitions to found any commission of bankruptcy against any person or persons, who might be at any time indebted to any copartnership, carrying on business under the provisions of the act, and all proceedings at law or in equity under any commission of bankruptcy, and all other proceedings at law or in equity, to be commenced or instituted for or on behalf of any such copartnership, against any person or persons, bodies politic, or corporate, or others, whether members of such copartnership or otherwise, for recovering any debts or enforcing any claims or demands due to such copartnership, or for any other matter relating to the concerns of such copartnership, should, after the passing of the act, be commenced or instituted and proceeded in the name of any one of the public officers, as the nominal plaintiff or petitioner for and on behalf of such copartnership.

These words, therefore, in express terms, comprehend any proceeding either at law or in equity under a commission of bankrupt. Then the second act provides, "that any such public officer may, in his own name, commence and prosecute any action, suit, or other proceedings at law or in equity, against any person being, or having been, a member of the said copartnership, either alone, or jointly with any other person, against whom any such copartnership has, or may have, any demand whatsoever;" and I think, that the proceedings here referred to must be such as were comprehended in the former act. It appears to me, therefore, that this case is not only within the spirit and intent of the act, but within its very terms, construed and limited as they must be by the terms of the former enactment. It follows, that the judgment of the Court of Review must be affirmed, and this appeal be dismissed with costs.

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ORDERED accordingly.

Ex parte DAVIDSON.—In the matter of CALDECOTT.

BEFORE the hearing of the appeal on the special case in this matter (a), but after the Order of the Court of Review had been drawn up on the original petition, the assignees advertized a dividend meeting, which

Westminster,  
November 13.  
Pending an appeal from an Order directing the admission of a proof, a dividend meeting is held, and, on the assignees opposing the payment of the

(a) See ante, p. 368.

dividend upon this proof, it is withheld; a fund being set apart to answer it. The creditor then presents a petition stating the non-payment of his dividend, but suppressing the fact of the fund being set apart, and praying costs personally against the Commissioners. On this petition and a corresponding affidavit, he obtains, *ex parte*, an Order staying the dividend, generally. The appeal being determined in his favour,

*Held*, that the suppression in the affidavit, on which the *ex parte* Order was obtained, disentitled him to any relief.

*Held*, also, that it was not a case for the Commissioners to pay costs; and the petition dismissed with costs, as against them.



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was accordingly held, and the Order of the Court of Review was produced on behalf of the petitioner, who claimed a dividend upon the proof ordered by the Court of Review to be admitted on the proceedings. This claim was resisted by the assignees, on the ground that the Order produced was not sealed, and that an appeal from it was pending. The payment of the dividend was then ordered to be made to all the creditors who had proved; but, with respect to the petitioner, a sufficient fund was set apart to answer the dividend upon his proof, in the event of the appeal being unsuccessful. The petitioner thereupon presented the present petition, praying that the dividend might be stayed, generally, and that the costs might be paid by the Commissioners personally, or by the assignees, or otherwise out of the estate. In support of the petition, an affidavit was filed, setting forth the refusal of the Commissioners to order the payment of the dividend to the petitioner, but omitting to state the fact of a fund having been reserved. On August 30th an application was made to the Court to answer the petition, and to appoint an early day for the hearing; whereupon the Court directed the petition to be answered for the next general petition day, and ordered the dividend to be stayed till the further Order of the Court. The petition now came on to be heard.

Mr. *Anderdon*, and Mr. *Little*, for the petition. The Commissioners could not have any right to resist the execution of an Order of this Court; and their venturing to do so cannot be regarded as a proceeding by them in the exercise of their legitimate functions, but must have proceeded from ignorance, or from contumacy. In

such a case, the Court has jurisdiction to order them to pay costs. Lord *Eldon* made such an Order in the case of a Mr. *Johnson* (a), mentioned in the judgment in *Ex parte Scarth* (b), and a similar Order was made by Lord *Lyndhurst* in *Ex parte Kirby* (c). And in *Ex parte Hall* (d) this Court intimated an opinion, that it had jurisdiction to control the conduct of the Commissioners in a similar way. Such a jurisdiction seems indeed necessarily to arise under the act 1 & 2 Will. 4. c. 56. s. 2., which gives the Court authority to hear and determine, order and allow, all such matters in bankruptcy as might, before the passing of the act, have been brought, by petition or otherwise, before the Lord Chancellor, whether such matters arise in the Court of Bankruptcy, or elsewhere.

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Mr. *J. Russell*, for the assignees. There is no case, where an Order of this Court has been executed, pending an appeal. [Sir *John Cross*. But there is no rule to prevent its execution. If there were, any one might, by appealing, suspend the functions of the Court.] That argument certainly would apply to appeals from other Courts, but not to an appeal from this Court; such an appeal being made with the sanction and under the direction of the Court itself. The course which was taken was the best that could be adopted under the circumstances; it was better than that of postponing the dividend, which might have let in other creditors, and diminished the petitioner's share of the assets. The fund being set apart to answer a particular claim, no other creditor could take any part of it.

(a) *Ex parte Edwards*, 6 Ves. 3.
(b) 15 Ves. 296.

(c) *Mont. & M'A.* 415.
(d) 1 Dea. 536.

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Mr. *Bacon*, for the Commissioners. Admitting the jurisdiction of the Court to order the Commissioners to pay costs, when a proper case arises for that purpose, the present case cannot be regarded in that light. It does not at all resemble the cases cited. In *Johnson's* case, the Commissioner was made to pay costs, but not as Commissioner; for he had acted as banker, solicitor, and assignee under the commission, as well as in the character of Commissioner. *Ex parte Kirby (a)* was a case where the Commissioners had taken more than the statutable fees; and the Court ordered the commission to be renewed to London Commissioners, and that the country Commissioners should be prevented from acting further as Commissioners of bankrupt. These are instances of misconduct affording no precedent in such a case as the present. The Court has not now before it the affidavit on which the proof was tendered, and therefore cannot take upon itself to say, that the rejection of it was even an erroneous decision. The bank to whom the dividend was payable was insolvent; and that is a circumstance, which has always been considered sufficient for staying the execution of an Order, pending an appeal from it. The petitioner has suffered no prejudice whatever from the delay; while, on the other hand, if the money had been paid, the object of the appeal would have have been frustrated. At all events, there is no case in which the Court has thought fit to order the Commissioners to pay costs on account of a mere error in judgment, although its power to do so may be unquestionable.

Mr. *Anderdon*, in reply.

(a) Mont. & M'A. 414.

Sir JOHN CROSS.—The petitioner had from the first a just claim to prove a debt of 2000*l.* against the estate. The Commissioners, however, in the exercise of their judgment upon a nice question of law, rejected the proof; of this rejection the petitioner complained to this Court; and the Court, after argument, ordered the Commissioners to admit the proof. The assignees appealed from this Order, as they had a right to do; and upon that appeal, the Order was confirmed by the Lord Chancellor. It stands, therefore, now in full force, and the Commissioners are bound to execute it. However, after the Order of the Court of Review had been made, and while the appeal from it was pending, the assignees thought fit to call a meeting for a final dividend, confidently expecting, as they now state, that the appeal would be previously decided. It turned out, that it was not heard before the day appointed for the meeting. The meeting was nevertheless held, and the Commissioners were served with the Order of this Court, but declined to obey it, upon its execution being resisted by the assignees, who took the frivolous objection, that the Order was not sealed with the seal of this Court. The assignees therefore led the Commissioners into an erroneous rejection of the petitioner's proof; but they reserved a fund for a dividend. This proceeding was undoubtedly wrong; and it is clear, that the Commissioners ought to have executed the Order of this Court. They were, however, induced to withhold payment of the dividend by the unfair objections and resistance which were offered on the part of the assignees. The Commissioners might have made a dividend, and the assignees might have applied to this Court to stay the payment of it to the petitioner. Instead of doing so,

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they ordered a dividend to be paid to the other creditors, reserving a sufficient fund to meet the claim of the petitioner, if it were ultimately established. In this state of things, the petitioner came here, presenting a petition, stating the refusal of the Commissioners to order the payment of his dividend, but altogether suppressing the fact that the fund had been reserved. Upon this petition, he obtained, *ex parte*, an Order to stay the payment of the dividend; an Order which the Court would never have made, if it had been informed of the reservation of the fund. He now complains of the injustice of withholding payment of what is due to him. But what is the effect of this Order, which he has so improperly obtained? Why to prevent the other creditors from receiving their dividends. As the Order staying the dividend was thus obtained (*a*), and as there is nothing to warrant the charges of ignorance and contumacy which have been made against the Commissioners, but of which the Court entirely acquits them, the petition must be dismissed, as against the Commissioners, with costs. But the Court makes no Order as to the costs of the assignees as petitioners, simply dismissing the petition as to these parties. They must settle these costs as they can.

(*a*) See what is said by Lord Cottenham, C., in *Attorney-General v. Mayor of Liverpool*, 1 My. & Cr. 210, as to misrepresentation of facts, on an application to the Court of Chancery for *ex parte* injunctions.



Ex parte JOHN MAY.—In the matter of JOHN MAY.

THE bankrupt had in this case become a lunatic, but no commission of lunacy had been issued. He now presented his petition by *Hannah May*, his mother and next friend, praying that the affidavit directed by the statute (a) to be made by the bankrupt on the allowance of his certificate, might be dispensed with, and that the Commissioners might be directed to sign the certificate, without having produced to them such affidavit; and that on the certificate being allowed, the bankrupt's allowance might be paid to *Hannah May*. The fiat was issued in 1838, and four-fifths in number and value of the creditors had signed the certificate; but the Commissioners declined affixing their signatures, for want of the usual affidavit on the part of the bankrupt.

Mr. Keene, in support of the petition, referred to *Ex parte Currie* (b).

(a) 6 Geo. 4. c. 16. s. 122. "And be it enacted, that such certificate shall be signed by four-fifths in number and value of the creditors of the bankrupt, who shall have proved debts under the commission to the amount of 20*l.* or upwards, or after six calendar months from the last examination of the bankrupt, then, either by three-fifths in number and value of such creditors, or by nine-tenths in number of such creditors, who shall thereby testify their consent to the said bankrupt's discharge as aforesaid; and no such certificate shall be such discharge, unless the Commissioners shall in writing under their hands and seals certify to the Lord Chancellor, that such bankrupt has made a full discovery of his estate and effects, and in all things conformed as aforesaid, and that there does not appear any reason to doubt the truth or fulness of such discovery, and also that the creditors have signed in manner hereby directed, and unless the bankrupt make oath in writing, that such certificate and consent were obtained without fraud, and unless such certificate shall after such oath be allowed by the Lord Chancellor, against which allowance any of the creditors of the bankrupt may be heard before the Lord Chancellor."

(b) 10 Ves. 51.

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Westminster,
November 12,
and Serjeants'
Inn Hall,
May 25 1842.

Where it appeared that a bankrupt was, by reason of lunacy, (though not found by inquisition), incompetent to make the usual affidavit that his certificate and the consent of the creditors to his discharge had been obtained without fraud, his own affidavit was dispensed with; but in such a case, an affidavit to the above effect, must be made by some one else.

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Sir JOHN CROSS.—Is there any rule, which makes it necessary for the Commissioners to require such an affidavit to be made by the bankrupt, before they sign his certificate?

Mr. Keene. The only clause of the statute which affects the case is the 122nd section; but that certainly creates no such necessity; and I am not aware that there is any provision which requires such an affidavit to be produced to the Commissioners, before they sign the certificate. The practice is however for such an affidavit to be produced, and for the Commissioners to mark it as an exhibit.

Sir JOHN CROSS.—It does not appear to me, that the statute makes it necessary for the Commissioners to have such an affidavit produced to them, before they sign the certificate; but that it only requires the Court to have such an affidavit, before the certificate is allowed. However, if the bankrupt is in such a state of incapacity, as to render it impossible for him to make such affidavit, it seems only a reasonable construction of the act to hold that the words “unless the bankrupt make oath in writing” shall mean in such a case as the present, “shall cause such oath in writing to be made;” and if another person can make an affidavit to the same effect, that, together with the production of the Commissioners’ signatures to the certificate, will under the circumstances of the case be sufficient. I suggest this course, under the impression that without some such affidavit as I have mentioned, the object of the legislature would be defeated.

The ORDER was, that the Commissioners might

dispense with the bankrupt's affidavit, and the rest of the petition was ordered to stand over.

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Mr. Keene on this day renewed his application, producing an affidavit of *William Hearne*, the solicitor to the assignees, to the following effect: "That the certificate, bearing date the 14th day of April 1842, under the hands and seals of *Richard Missing*, *Henry Goode*, and *John James Foguett*, three of the Commissioners in the said fiat named, authorized to proceed upon the said fiat,—whereby they have certified to the Right Honorable the Lord High Chancellor of Great Britain, and the Right Honorable the Chief Judge, and their Honors the other judges of the Court of Review, in bankruptcy, that *John May*, the above named bankrupt, hath in all things conformed to the several statutes made and now in force concerning bankrupts, and the consent of all the said *John May's* creditors who have signed their names at the foot of the said certificate, that the said Commissioners might sign the same, and that the said *John May* might have such allowance and benefit as are given to bankrupts by the said acts, and be discharged from his debts in pursuance of the same—was obtained fairly and without fraud, as this deponent verily believes, and hath no doubt; and this deponent further saith, that he has been informed and verily believes that the said *John May* is now, and has been, for the space of three years last past, a lunatic, and incapable of taking an oath, or of in any way managing himself or his affairs." Upon this affidavit being read,

The COURT made the Order allowing the certificate.

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A bankrupt, having accepted a bill for 200*l.*, which had been negotiated by the drawer, and finding shortly before it fell due that he should be unable to pay it, persuaded the drawer to draw another bill on him for 220*l.*, and to get it discounted, in order that he might take up the first mentioned bill. The drawer discounts the bill for 220*l.* with the petitioner, but, instead of applying the proceeds to pay off the first bill, appropriates them to his own use; and the holder of the first bill proves the amount of it under the fiat. *Held*, that the petitioner, who had no knowledge of the circumstances under which the second bill was given, or of the breach of trust committed by the drawer, was not prevented from proving the amount of such second bill.

Ex parte LYON SAMUEL.—In the matter of JOHN PHILPOT.—

THIS was a petition to prove as an indorsee of a bill of exchange for 220*l.*, dated the 30th January 1841, and payable three months after date, which had been accepted by the bankrupt, and which the petitioner had discounted for the drawer.

It appeared, that the bankrupt had accepted a former bill for 200*l.*, drawn on him by *W. Clark*, which became due on the 27th January last; and that a few days before it became due, the bankrupt, finding that he should not be able to pay the amount when it arrived at maturity, applied to *Clark* to draw another bill on him at three months for 220*l.*, and get the same discounted; the bankrupt intending with the amount to be produced by such discount to take up the bill for 200*l.* *Clark* then drew the bill for 220*l.*, which the bankrupt accepted, and *Clark* took it away to get discounted. *Clark*, however, did not bring the bankrupt the cash for the bill for 220*l.*, neither did he take up the bill for 200*l.*, which was accordingly dishonored by the bankrupt, and it was afterwards proved by the holder under the fiat. On the 29th January last, the petitioner, on the application of a bill-broker, discounted the bill for 220*l.*, on the terms of 20*l.* being allowed as the amount of the discount, the petitioner having no notice, as he alleged, of any circumstances which would affect the liability of any parties to the bill.

On the 3rd July last, when a meeting was held for declaring a dividend under the fiat, the petitioner applied to prove the bill for 220*l.*, but the proof was opposed by the assignees, on the ground that *Clark* had not given the bankrupt full consideration for the same; for that

he had negotiated for his own purposes the bill for 200*l.*, and had also converted to his own use the proceeds of discounting the bill for 220*l.*, instead of paying them over to the bankrupt, to enable him to take up the bill for 200*l.* The petitioner contended, that he had nothing to do with what might have passed between the drawer and acceptor of the bill, and that as he had no notice of the above transactions between them, he was entitled to prove on the bill for 220*l.* The Commissioner, however, refused to admit the proof, or even a claim to be entered, but proceeded to declare a dividend.

It was alleged, in answer to the petition, that it was the practice of the London Commissioners to reject proofs on bills of exchange obtained under the above circumstances, unless distinct evidence, beyond the claimant's oath, is given, that the holder was not party or privy to the original transaction between the parties to the bill, and that the holder had given a *bonâ fide* consideration for the bill.

The petitioner stated in his affidavit in reply, that, when he tendered his proof on the bill, he informed the Commissioner, that he was then prepared to prove the consideration he gave for it, and had then with him the paid check on his bankers, which he had given as the consideration for the bill, and also his banker's pass-book, by which the payment of the check would have appeared; but that the Commissioner refused to hear such evidence, or to inspect the check or pass-book.

The petitioner prayed, that he might be admitted to prove on the bill for 220*l.*, and that in the mean time, the payment of the dividend might be stayed.

Mr. *J. Russell* appeared in support of the petition.

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Mr. *Spurrer*, for the assignees. The real debt due from the bankrupt has been proved once by the holder of the first bill for 200*l.*; and the question is, whether this debt is to be proved a second time. The second bill was a fraud upon the bankrupt; for *Clark* appropriated to his own use the proceeds arising from the discount of the second bill, which was given to him for the express purpose of paying off the first. [Sir *John Cross*. There is no suggestion in any of the affidavits in answer to the petition, that the petitioner was privy to the fraud of *Clark* in his transaction with the bankrupt.] There is no sufficient denial by the petitioner, of his knowledge of the original transaction between *Clark* and the bankrupt. The consideration being impeached as to the original transaction between the parties to the bill, it was incumbent on the holder to prove the consideration under the circumstances under which the second bill was given. *Clark* could not recover on that bill in an action at law against the bankrupt. Then, as the drawer could not recover on the bill against the acceptor, the *onus* lies on the holder to prove that he gave a proper consideration for the bill; and this must appear from other evidence than that of the holder himself. As the consideration therefore for this bill was disputed, the Commissioner was bound to require some other evidence, besides that of *Samuel*, the petitioner; and as no witness was produced to confirm his statement, the Commissioner was right in rejecting the proof.

Sir JOHN CROSS.—It appears to me, that there was no foundation in law or fact for the rejection of this proof. The circumstances under which the proof was rejected were these. There was an antecedent bill for 200*l.*

accepted by the bankrupt, and about falling due, which the bankrupt was unable to pay; and, in order to provide for the payment of this bill, he prevailed on *Clark* to draw another bill on him for 220*l.*, which the bankrupt accepted, and then requested *Clark* to get it discounted. *Clark* accordingly discounted this last mentioned bill with the petitioner; and, as is now alleged by the assignees, appropriated the proceeds to his own use, instead of paying off the first bill for 200*l.* With all these transactions between the bankrupt and *Clark*, the petitioner had nothing on earth to do. The petitioner was not responsible for the *ex post facto* default of *Clark*, nor was he bound to see to the application of the money which he paid *Clark* on the occasion of discounting this second bill. It was objected again to the petitioner's right of proof, that the original bill for 200*l.* had been proved under the fiat, and therefore that the petitioner could have no claim on the bill for 220*l.*, while the other continued a charge upon the bankrupt's estate. I think there was no ground for this objection. The value or nature of the consideration, which *Clark* gave for the bill, was not in issue before the Commissioner; but merely the consideration which the petitioner himself gave for it, and which he swears he was prepared to prove before the Commissioner. It is then said, that the petitioner ought to have been provided with some witness to prove the consideration. But the holder of a bill, applying to prove it under a fiat in bankruptcy, is not bound to produce witnesses to establish his claim, like a plaintiff in an action at the assizes. I am of opinion, that the petitioner was not answerable for *Clark's* breach of trust; and that, as the evidence stood before the Commissioner, he was entitled to prove on the bill for 220*l.* With respect to suspending the payment of the dividend,

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no Order on that subject can be made, as it appears that the dividend has been already paid; but the petitioner will be entitled to be paid the dividend already declared, before any further dividend is made under the fiat.

Mr. *Russell* applied for costs.

Sir JOHN CROSS.—If a creditor will postpone his application to prove his debt, until a meeting is called for the purpose of declaring a dividend, he must take the consequences of an opposition being made to his proof by the assignees. If he had applied to prove before the dividend meeting, the case would have been different; but I think, under these circumstances, the Court cannot give him costs.

Proof allowed.

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6 & 7.*

Ex parte SPICER.—In the matter of KIPPING.—

Although a fiat may be concerted between the bankrupt and the petitioning creditor, and may be lawfully issued to defeat an execution, still, if the main object is to serve the purposes of the bankrupt and the petitioning creditor, and not for the benefit of the general creditors, it will be annulled.

THIS was the petition of a creditor to annul the fiat, on the ground that it was fraudulently concerted between the bankrupt and the petitioning creditors, for the purpose of benefiting the former, and not with a view to the interests of the general creditors.

The bankrupt, who was described in the fiat as a broker, was also a sheriff's officer, and resided at Maidstone. The docket was struck on the 13th August; and the fiat issued on the 31st August, the very day on which the petitioner had taken the bankrupt's goods in execution for a debt of 230*l*. The petitioning creditor was Mr. *King*, an attorney, and his debt was composed

of an account against the bankrupt for costs in defending the action brought against him by the petitioner, together with a charge for the expenses incurred in obtaining a certificate for the bankrupt's brother under a fiat issued against him five years before. For the amount of these charges the bankrupt had, in the character of a surety, joined his brother in giving a promissory note; but it was not clear that the note was given before the arrangement was made between the petitioning creditor and the bankrupt, for issuing the present fiat. After the fiat was opened, and a day appointed for the choice of assignees, Mr. *King*, the petitioning creditor, went down to Maidstone to canvass for proofs, and for powers of attorney to vote in the choice of assignees; some of which were given to himself, and some to his clerk for that purpose. On the day appointed, a Mr. *Marshall*, who was the only creditor proving without a power of attorney, was appointed sole assignee, on behalf of creditors whose debts amounted only to 333*l.*; although it appeared that the bankrupt's debts and liabilities amounted to 1200*l.* From the few creditors who had proved, the bankrupt had already obtained his certificate. The total amount of the assets produced by the sale of the bankrupt's effects was 97*l.*, and the debts alleged to be due to him were not recoverable, by reason of the operation of the Statute of Limitations. It was admitted in the affidavits of the bankrupt and *King*, that the fiat was taken out for the purpose of defeating the petitioner's execution.

Mr. *Anderdon*, in support of the petition. The affidavits on the other side merely deny that the act of bankruptcy was concerted, but not the circumstances of concert in issuing the fiat; which, though they do not

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affect its validity, afford nevertheless strong grounds for suspicion that it was issued for an improper purpose. For, although a fiat is now not absolutely void for having been concerted between the bankrupt and the petitioning creditor, yet the concert is a material ingredient in the case to determine whether it is the bankrupt's fiat, or not. Therefore, although under the 42nd section of the 1 & 2 Will. 4. a fiat cannot be annulled by reason only of its being concerted between the petitioning creditor and the bankrupt, yet the Court may have regard to the fact of concert, in conjunction with the other circumstances of the case, which show that the fiat was not issued for a *bonâ fide* purpose; *Ex parte Clark* (a). It is true, that a fiat may be lawfully issued to defeat an execution; but then it must not be the fiat of the bankrupt. And where it satisfactorily appears to the Court that a fiat has been concerted between the bankrupt and the petitioning creditor, for the sole purpose of defeating a judgment creditor, and procuring for the bankrupt his certificate, the fiat will be annulled, notwithstanding the sufficiency of the usual requisites; *Ex parte Gaitshell* (b). On these two cases I rely, as incontrovertible decisions to govern that of the present case, in which it is sworn, and in which it is also apparent from the facts, that the fiat was sued out for the purpose of serving the bankrupt's own object, and not to distribute his effects among the general creditors. The petitioning creditor was also an attorney, and the whole amount of the bankrupt's property realized under the fiat, which was only 97*l.*, was just enough to pay the petitioning creditor his costs. The debts alleged to be due to the bankrupt are quite worthless, from the lapse of time since they accrued.

(a) 4 Deac. 156.

(b) 1 Mont. & C. 160; 3 Deac. 635.

Mr. *Bacon*, for the bankrupt. The bankrupt denies all fraud or collusion with the petitioning creditor, although he admits that the fiat was issued to avoid the execution of the petitioner. The debt for which that execution issued was founded on an award, by which the arbitrator awarded the sum of 103*l.* to be due to him; but it appears from the affidavits, that the arbitrator was mistaken in awarding this sum to be due to the petitioner; for he omitted to allow to the bankrupt certain payments, which he was entitled to have taken into consideration. It is sworn, and not denied by the petitioner, that before the award was made, the petitioner offered to accept from the bankrupt 25*l.*, in satisfaction of his debt. The present case is wholly distinguishable from the cases cited.

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Mr. *J. Russell*, for the assignees, contended that there was no ground whatever for presuming that the act of bankruptcy was concerted; and that the other circumstances of the case were not sufficient to justify the Court in annulling the fiat.

No counsel appeared on behalf of the petitioning creditors.

Mr. *Anderdon*, in reply, was stopped by the Court.

Sir JOHN CROSS.—This is a petition to annul a fiat, on the ground that it was sued out to defeat an execution creditor, for the purposes of the bankrupt, and not substantially for the benefit of the creditors. It is the petition of the execution creditor, who became entitled on the 31st August to issue execution against his debtor, and who was defeated by the suing out of the

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fiat on the very day on which he was enabled to enforce his rights. It is indeed admitted, that it was the object of the bankrupt and *King* to defeat the execution,—the former having declared that he instructed the latter to take proceedings on purpose; and that, in accordance with these instructions, *King* took steps to delay the execution, by obtaining a rule to stay the proceedings under it, provided the money was brought into Court. In the meantime, however, a bankruptcy is got up, and *King* is to become the petitioning creditor for his costs in that very suit, added to the amount of a promissory note in which the bankrupt joined with his brother, as surety, for the payment of the costs in obtaining his brother's certificate under a bankruptcy occurring five years ago. This constituted the petitioning creditor's debt. But there was no proof whatever that this note was given to the petitioning creditor before the 28th August, although the docket was struck on the 13th August. As soon as the fiat was opened, we find *King* at Maidstone, canvassing the creditors for powers of attorney, to enable him to vote for them in the choice of assignees. Only one other creditor, besides those from whom *King* obtained the powers of attorney, proved under the fiat, and that creditor was chosen sole assignee by creditors whose debts amounted only to 333*l.*, although the debts and liabilities of the bankrupt exceeded 1200*l.* Not half of the bankrupt's creditors ever proved their debts under the fiat, and from those few who had thus proved the bankrupt obtained his certificate. Now, it is asked by the counsel for the respondents, is a fiat to be annulled, merely because it was sued out to defeat an execution? I say, certainly not. It might have been very right to pursue such a course. I admit,

also, that, according to a declaration in a recent statute, a fiat is not voidable, only by reason that it has been concerted between the bankrupt and the petitioning creditor. But it seems, that in this case the fiat was concerted merely to serve the purposes of the bankrupt, and not with any view of benefiting the creditors. I should have felt reluctant to annul it, if there was any chance that it could be worked beneficially for the creditors. But what has been already the result? The bankrupt got his certificate in a few weeks after the fiat was issued, and there is no prospect of a farthing to be divided among the creditors. The assets realized a sum under 100*l.*, and the only fruit of the fiat would be to enable *King* to absorb the whole property for his costs as petitioning creditor, and to release the bankrupt from his liabilities to his creditors by the medium of his certificate. Among the items in *King's* bill of costs, I observe, that, instead of writing a letter to the bankrupt at Maidstone, he thinks proper to make a journey there, and charges 4*l.* 4*s.*, and 2*l.* 5*s.* for travelling expenses. Under all the circumstances, it is impossible to doubt but that the fiat was concerted to defeat the execution, not for the purpose of serving the creditors, but for the private purposes of the bankrupt and the petitioning creditor; and I therefore think that it ought to be annulled at the costs of the party who sued it out.

Fiat annulled, with costs.

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*Serjeants' Inn
Hall,*

December 7 & 8.

L. and C. employed packmen to travel round various districts in the country to sell their goods, in the course of which dealings were had with 3500 customers. L. and C. dissolved their partnership, of which notice was given in the Gazette, and sold the debts owing on these different rounds to the new firm of S. and C., which continued the same course of dealing; and some of the bills of parcels delivered to the customers by one of the packmen were altered in the heading from the firm of L. and C. to that of S. and C.; but it did not appear that any express notice was given to the customers of the assignment of the debts from the old to the new firm. Both firms became bankrupt.

Held, under these circum-

stances, that there was not such proof of want of notice to the different debtors, of the assignment of the debts from the old to the new firm, as to raise the inference that the debts continued in the order and disposition of the old firm.

Ex parte PHILIP WOODGATE.—In the matter of DAVID LITTLE and DAVID CHALMERS, and in the matter of SMITH and CHALMERS.

THIS was the petition of a creditor, praying that a certain sum might be declared to belong to the joint estate of *Little and Chalmers*.

Little and Chalmers carried on business in partnership together, as drapers and tea dealers at Norwich and Great Yarmouth, in the county of Norfolk, under the firm of "*Little and Chalmers*," and were in the habit of employing certain persons, called packmen, to sell goods on their account. Each packman had a certain district allotted to him, containing several parishes, known by the name of a round, in which he sold and disposed of the goods supplied to him by the firm on their account, and usually gave credit to his customers for the goods so sold, and entered in his book of accounts the sums due from them respectively on account of such sales; and the debts thus incurred were in general paid by them to the packman the next time he came his round. *Chalmers* was accustomed to go one of the rounds himself, and took with him papers for the purpose of making out accounts with the customers of goods sold by him to them, on which the words "*Bought of Little and Chalmers*" were printed; and, upon any dealing with a customer, delivered to him one of these papers; and the same practice was also pursued by the different packmen. By means of these dealings, a valuable connexion was formed, and the rounds were readily

and easily saleable at nearly the amount of the good debts appearing to be due from the different customers in the books of the packmen.

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On the 27th December 1839, *Little and Chalmers* dissolved their partnership, and notice of such dissolution appeared in the Gazette on the 10th of January 1840, being then possessed of several of these rounds in the counties of Norfolk and Suffolk.

On the 1st January 1840, *Chalmers* entered into partnership with *Edward Smith*, as drapers, at Norwich, under the firm of "*Smith and Chalmers*;" to which latter firm *Little and Chalmers* sold the chief part of their rounds for the sum of 2650*l.* In payment of this sum, *Little* drew eight bills of exchange on *Smith and Chalmers*, which they accepted for different sums of money, amounting in the whole to 2650*l.*; and which bills were afterwards delivered to *Little*. It was agreed between *Little and Chalmers*, that all debts due to them on the different rounds should be received by *Smith and Chalmers*, and that the debts owing by *Little and Chalmers* should be paid by *Little*; and a written notice of this agreement was sent by *Little* to the creditors of the firm of *Little and Chalmers*. In consequence of this notice, many creditors of *Little and Chalmers* drew bills of exchange on *Little* for the amount of their respective demands, which *Little* accepted. No notice, however, was given to the debtors of the firm of *Little and Chalmers*, that the debts were to be paid to the firm of *Smith and Chalmers*.

On the 15th February 1840, a fiat in bankruptcy was issued against *Smith and Chalmers*; and on the 12th March 1840, another fiat was taken out against *Little*

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and *Chalmers*, under which they were severally found bankrupts; and the same assignees were appointed under each fiat.

The petitioner was a creditor of the firm of *Little and Chalmers* for the sum of 232*l.* 3*s.*, which he had proved against their estate.

The rounds, which had been thus purchased by the new of the old firm, were sold by the direction of the assignees for the sum of 2794*l.* 14*s.* 4*d.*, the greater part of which sum they had already received, and the residue was secured by a good bill of exchange. This sum was carried by the assignees to the credit of the estate of *Smith and Chalmers*; and at the audit of the accounts of the assignees, the Commissioners considered this sum to belong to the estate of *Smith and Chalmers*.

The petitioner alleged, that all, or the greater part, of the debts included in the rounds so sold were contracted with the firm of *Little and Chalmers*; and that he was advised, that such part of the debts so contracted did not belong to the estate of *Smith and Chalmers*, but to the estate of *Little and Chalmers*, and ought to be applied in payment of their joint creditors. The Commissioners postponed declaring a dividend, in order that it might be decided to which estate the sum of 2794*l.* 14*s.* 4*d.* belonged.

The prayer was, that it might be declared that the said sum of 2794*l.* 14*s.* 4*d.*, or so much thereof as arose from the purchase of debts due to the firm of *Little and Chalmers*, formed part of the estate of that firm, and that the same might be applied in payment, so far as it would extend, of their joint creditors; and that, if necessary, an account might be taken of what part of the

said sum was composed of, or paid on account of, debts due to the firm of *Little and Chalmers*.

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Mr. *J. Russell*, and Mr. *Elmsley*, in support of the petition. As no notice was given to the parties indebted to the firm of *Little and Chalmers*, upon the dissolution of their partnership, of the sale to the new firm of *Smith and Chalmers* of the debts due to the firm of *Little and Chalmers*, these debts must be considered as the joint effects of *Little and Chalmers*. This is one of the points on which we rely. The other is, that what is called an assignment of the debts from one firm to the other was only an equitable executory arrangement, which was not perfected by *Little and Chalmers*. The dissolution of the partnership of *Little and Chalmers* did not appear in the Gazette until the 10th January 1840; and in a few weeks afterwards, namely, on the 15th February, the fiat issued against *Smith and Chalmers*. At the time of the dissolution of the first partnership, the amount of the debts due to the firm of *Little and Chalmers* exceeded the sum of 2600*l*. Of these debts a small amount only was collected by *Smith and Chalmers*, the greater portion of them being still due at the period of their bankruptcy. *Smith and Chalmers* continued to sell goods in the same way as the former partnership, to the amount of 500*l*.; but the customers, as is stated by one of the witnesses, thought they were buying of *Little and Chalmers*. There has, in fact, been no real consideration given by *Smith and Chalmers* for the purchase of these debts; for the 2650*l*. was not paid in cash, but bills were merely given for the amount; which bills have not been paid. The only feature that distinguishes this case from the ordinary

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case of the assignment of a debt,—of which notice to the debtor is indispensable to render it valid,—is, that here one of the assignors is also one of the assignees; but that makes no difference as to the principle which renders notice requisite. In *Ex parte Burton* (a), where two retiring partners, upon the dissolution of the partnership, assigned all the partnership debts to the continuing partner,—Sir *John Leach* held, that there was no substantial distinction between an assignment of a debt to a stranger, or a partner; and that the debts owing by those debtors, who had no notice of the assignment to the continuing partner, remained in the order and disposition of the continuing partner. That is a stronger case in favour of the principle contended for, than the present; for there the advertisement in the *Gazette* not only announced the dissolution of the partnership, but gave express notice that all the debts due to and owing by the partnership would be received and paid by the continuing partner; while here no notice of any kind, as to the assignment of the debts, was given to the debtors. The principle laid down in *Ex parte Burton* was confirmed and acted upon in the subsequent case of *Ex parte Usborne* (b). In examining the evidence contained in the different affidavits, it will be found that only one witness on the other side swears that notice of the assignment of the debts was given to the customers. He states, with singular precision, that the heading of the bills delivered to them was altered from the firm of “*Little and Chalmers*” to that of “*Smith and Chalmers*”; and yet not one of these bills thus alleged to be altered has been produced, although they must have been circulated through a district containing eight

(a) 1 G. & J. 207.

(b) 1 G. & J. 358.

rounds, which included 150 parishes and 3500 customers. This witness is positively contradicted by three others in support of the petition, who swear that no notice was given to any of the customers that the debts were to be paid to the new firm of *Smith and Chalmers*. It may be observed in conclusion, that the same assignees have been appointed for both estates; and therefore the estate of *Little and Chalmers* is not sufficiently protected; for the assignees have positively refused permission to any of the creditors of *Little and Chalmers* to inspect the accounts relating to the dealings of that firm.

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Mr. *Keene*, and Mr. *Bacon*, *contrà*, were stopped by the Court.

Sir JOHN CROSS.—This petition claims an Order that a large sum arising from the sale of the joint debts due to the firm of *Little and Chalmers*, which were assigned by them to the new firm of *Smith and Chalmers*, may be declared to belong to the estate of the former firm. The claim is made on two grounds: 1st, that there was no actual assignment of the debts to the new firm; and 2dly, that *Little* retained his share of the joint debts in his own order and disposition at the time of his bankruptcy. In regard to the first ground of claim, it appears that in the formation of the new partnership of *Smith and Chalmers*, the joint debts due to the firm of *Little and Chalmers* were sold and assigned to the new firm for the sum of 2650*l.*, and that this sum was paid by eight bills of exchange accepted by the new firm in favour of *Little*. It is objected, that these bills have not been paid; but they have been negotiated by *Little*

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for value received by him, and may be proved against the estate of *Smith* and *Chalmers*. I am of opinion, that this was an executed, and not merely an executory, contract; the bills were given to *Little* for the assignment of his share in the partnership debts and effects, and formed no part of the assets of the firm of *Little* and *Chalmers*.

As to the second ground on which this claim is made, namely, that the debts so assigned continued in the order and disposition of the firm of *Little* and *Chalmers*,—it appears that no less than 3500 debts were by this contract passed from the old to the new firm; and it is contended, that unless express notice was given of such contract to all these debtors, the debts must be taken to be in the reputed ownership of the old firm. But the petitioner has not laid his finger upon one single case, where the debtor had no notice of the change in the firm of the bankrupts; nor, indeed, does it appear from the evidence, that any one of the petty shopkeepers on these different rounds knew whether he was dealing with the firm of *Little* and *Chalmers*, or with that of *Smith* and *Chalmers*. The probability is, that the debtor never recognized any creditor but the packman who went his round; and that many of the customers, who were in the humbler classes of life, might not be able to read. There is no doubt, however, but that some of these persons, who *could read*, had notice of the change of the partnership, by the alteration in the heading of the bills of parcels, if one of the witnesses for the respondents is to be believed; for he expressly says, that the bill-heads were altered from the firm of “*Little* and *Chalmers*” to that of “*Smith* and *Chalmers*.” At all events, I think there is in this case no evidence of such a want of notice,

as would entitle the creditors of the old firm to claim this sum of money, in preference to the creditors of *Smith and Chalmers*.

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Petition dismissed, each party to be allowed his costs out of the respective estates.

Ex parte JOSEPH GRATTON.—In the matter of
JOSEPH GRATTON.—

*Serjeants' Inn
Hall,
Dec. 8 & 9.*

THIS was a petition of the bankrupt to annul the fiat, impeaching the trading, and the act of bankruptcy; it also prayed for an assignment of the bond.

The bankrupt was engaged as chief clerk to the Chesterfield Canal Navigation Company, which office he only quitted in December 1840, after having filled it for thirty-seven years. He was described as a brick-maker in the fiat, which was issued by a Mr. *Charge*, as the petitioning creditor, and who was also the solicitor of the company; the fiat was dated the 24th September last.

It appeared, that on the 26th January 1828, the bankrupt executed a mortgage to *Charge* of certain property for securing the payment of 2000*l.* and interest; which sum, the bankrupt alleged, was amply secured by the property mortgaged; and the interest of which was regularly paid, with the exception of that for the last half year, which became due on the 29th July last. On

that he could not support a fiat against his debtor for non-payment of the money within the twenty-one days.

When a public company proceed under the act, it must be proved that some person was duly authorized by them to demand the payment of the debt.

Semble, also, that where the proceedings are taken under that statute by the petitioning creditor, not for the purpose of obtaining the payment of his own debt, but to compel the bankrupt to satisfy the alleged debt of a third person, the fiat cannot be supported.

Where the petitioning creditor proceeded under the 1 & 2 Vict. c. 110. s. 8., and, for the period of a fortnight of the twenty-one days limited by the statute for the payment of the debt, kept out of the way, to avoid receiving it; and during his absence the debtor made a tender of the whole debt to the managing clerk of the petitioning creditor, who refused to receive it: *Held*, under these circumstances, that the petitioning creditor must be held to have concerted the act of bankruptcy, and

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the 9th August last, the bankrupt gave notice in writing to *Charge* of his intention to pay off the mortgage. The Chesterfield Canal Company claimed a large debt to be owing to them from the bankrupt, amounting to 3555*l.* for which they brought an action against him, and in which action *Charge* acted as their attorney. The petitioner alleged, that the company were desirous of making him a bankrupt, and that for that purpose it was arranged between them and *Charge*, that the latter should proceed for his mortgage debt under the provisions of the 1 & 2 *Vict.* c. 110. s. 8. *Charge* accordingly on the 21st August filed an affidavit of his debt in the Court of Bankruptcy, and on the 31st August served a copy of the affidavit, with a written demand for the payment of his debt upon the bankrupt; but never having previously intimated any desire to the bankrupt for the payment of such mortgage debt. The bankrupt, however, being anxious to provide the funds for the payment of this debt before the expiration of the twenty-one days limited by the 1 & 2 *Vict.* c. 110. s. 8., quitted his residence and place of business at Chesterfield early in the morning of the 8th September, and did not return until the 22nd September, being the day after that on which the twenty-one days allowed by the above act for compliance with some one of the requisites imposed by it expired. On the 8th September, Mr. *John Gratton*, a relation of the bankrupt, and on his behalf, called at the banking house of Messrs. *Crompton* and *Newton* in Chesterfield, and gave notice to provide, out of a sum of money in their hands placed to the credit of *John Oldham*, the sum of 2000*l.*, which he stated was required in payment of the debt due from the petitioner to *Charge*. In the course of that day, or the day following, one of the clerks of *Charge*

was informed of this notice so given to the bank. The bankrupt having obtained a sufficient sum from the bank, his solicitor, on the 18th September, went to *Charge's* office, accompanied by a clerk of the bank, having with him the amount of the principal and interest in the notes of the bank, in order to pay off the mortgage, but was informed by the clerks in the office that *Charge* was absent from home; whereupon the bankrupt's solicitor stated to two of the clerks, that he had come to pay off the bankrupt's mortgage, and produced the bank notes, which he tendered in payment of the principal and interest; when it was observed by one of the clerks, that, the notes not being Bank of England notes, the same was not a legal tender. Upon this objection, the bankrupt's solicitor expressed his intention to obtain the requisite amount in Bank of England notes and cash, and to return and tender the same; and he accordingly by a little exertion was enabled to procure sufficient Bank of England notes and gold coin, and went back to *Charge's* office to make the necessary tender; but the two clerks had then left the office. Upon this, the solicitor sent a messenger to require their attendance, when one of them returned for answer, that he would come shortly; but, after waiting an hour without his appearing, the solicitor sent for the other clerk, who sent word back that it was no use his coming, as the deeds were locked up and he could not get at them. The solicitor then informed a third clerk, who was in *Charge's* office, of the nature of his visit, and made a tender to him of the money in Bank of England notes and gold; but he declined receiving them, stating that he had no authority so to do. This tender was not made conditional upon the delivery of the mortgage deed, but was unshackled with any con-

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dition of that nature. The petitioner alleged, that, after *Charge* had served a demand upon him for the payment of the mortgage debt, he never notified his intention to absent himself, or gave the petitioner any information where he was to be found, to enable the petitioner to go or send to him for the purpose of paying off the mortgage debt; so that it was impracticable, as the petitioner alleged, to have paid the debt to *Charge* within the twenty-one days limited by the act of parliament. On the 22nd September *Charge* returned to Chesterfield, when he said that the tender made to his clerks in his absence was bad, and accordingly on the same day struck a docket against the bankrupt, having previously (on the 21st September) sworn the necessary affidavit at Thirsk in Yorkshire, which was before the expiration of the twenty-one days, and consequently before any complete act of bankruptcy could have been committed under the provisions of the act of parliament.

Under these circumstances, the petitioner submitted that the tender made of the debt to *Charge's* clerks was a good tender,—or, if not valid at law, still that it was a sufficient tender to bring the petitioner within the protection of the act of parliament; inasmuch, as it was through *Charge's* own default that he did not receive full payment of the debt within the twenty-one days.

The petition further alleged, that the fiat was sued out by *Charge* for a wrongful and improper purpose; which was not to obtain the payment of his mortgage debt, but to serve the purposes of the Chesterfield Canal Company, and deprive the bankrupt of the means of effectually defending the action that had been brought against him by the company; and that, to accomplish the object in view, *Charge* endeavoured, by his demand of the debt, and

subsequent absence from home,—without leaving any directions where he was to be found, or giving any authority to his clerks to receive the money in his absence,—to force the petitioner to commit an act of bankruptcy. That the petitioner was not engaged in any trade or business, but was a private gentleman advanced in years, and infirm in health; and that the messenger had taken possession of his dwelling house and effects, to his great inconvenience and discomfort.

In answer to the statements in the petition, *Charge* made an affidavit, in which he deposed, that, after making the demand of payment of the mortgage debt, pursuant to the provisions of the statute, he was at his office for a week following, and was perfectly accessible to the bankrupt; that he left home for Redcar in Yorkshire at the usual time he did every year, and which was well known in the neighbourhood; that it was also well known that the bankrupt was greatly involved in debt, and was a defaulter to a large amount to the Canal Company; that the bankrupt gave him no notice that he intended to pay the money; and that, from the difficulties under which he laboured, *Charge* did not suppose it possible that he would be able to pay it within the twenty-one days.

It appeared, that the Chesterfield Canal Company had also taken proceedings against the petitioner under the 1 & 2 Vict. c. 110. s. 8., in order to make him a bankrupt; and that the adjudication proceeded as well on the act of bankruptcy, for not paying the debt of the company, as for the like default in not paying the debt of *Charge*.

Mr. *Anderdon*, and Mr. *Fitzherbert*, in support of the petition. There has been a sufficient tender of the

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debt in this case, to satisfy the provisions of the act of parliament, and to prevent the non-payment of it being considered as an act of bankruptcy. By the 8th section of the statute (a) in question it is provided, that if the trader shall not within 21 days, after personal service of the affidavit of the creditor and the notice requiring immediate payment, pay the debt, or secure or compound for the same to the satisfaction of the creditor, or enter into the bond therein specified, every such trader shall be deemed to have committed an act of bankruptcy on the 22nd day after service of the affidavit and notice. Now, in this case, the creditor, for the space of two weeks out of three which are limited by the act of parliament for the payment of the debt, absents himself from the very place where he ought to be met with to receive the debt; and then takes advantage of his own absence to make the petitioner a bankrupt. The petitioner here did all that was in his power, and all that could be reasonably expected of him to comply with the requisitions of the act of parliament. On the 18th September, which was three days previous to the expiration of the twenty-one days, his solicitor on his behalf goes to the office of the creditor, where he ought either personally to have attended to receive the money, or to have authorized some person for that purpose in his absence, and tenders to *Charge's* managing clerk the full amount of the debt due in Bank of England notes and cash. Suppose a creditor, after making the affidavit and serving the notice for payment of the debt, was to sail the following day for India, without leaving authority with any person to receive the money for him in his absence,—can it be contended, that in such a case the

(a) 1 & 2 Vict. c. 110. s. 8.

non-payment of the debt within the twenty-one days would be an act of bankruptcy, within the meaning of the statute? If the creditor thus absents himself, and does not authorize any one to receive the money for him, that is equivalent to a refusal to receive it. He makes himself a party to the alleged default of his debtor; and if he is a consenting party to such default, he cannot take advantage of it as an act of bankruptcy; *Ex parte Brown (a)*.

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It may be contended on the other side, that the petitioning creditor may rely upon another act of bankruptcy; and that, inasmuch as the Chesterfield Canal Company have also proceeded under the act of parliament, and the bankrupt has not paid or secured their debt within the twenty-one days, the petitioning creditor in this case can avail himself of that default as an act of bankruptcy. But this, we submit, he cannot do. The act of parliament was intended for the creditor's own remedy, and his own remedy only, and was not meant to serve any collateral purpose. [Sir *John Cross*. The act of parliament declares it an act of bankruptcy, if "such debt" is not paid or secured within a certain time. The question is, therefore, whether this does not mean the debt specified in the affidavit of the particular creditor who is proceeding under the statute, and not the debt of any other creditor who may also have proceeded under the statute.] It was certainly not intended by the statute, that a creditor was to avail himself of its provisions, not to recover his own debt, but for the benefit of other persons. In the present case, the creditor had ample security for his debt; he had the security of a good and sufficient mortgage for the full amount of it, ever since the year 1828, and was perfectly content

(a) *Mont. & C.* 177.



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with his security. It was so ample, indeed, that the bankrupt was able, within a few days, to raise money on the property sufficient to make a tender of the whole mortgage debt. It would be committing an abuse of the process of the Court, to permit the present petitioning creditor to work this fiat for the mere purposes of the Chesterfield Canal Company. In *Ex parte Hall (a)*, where a fiat was sued out under this very act of parliament, not for the legitimate purposes of a fiat in bankruptcy, but to enforce the payment of a disputed partnership debt by an *ex parte* proceeding, this Court felt itself bound to annul the fiat. This, and other cases that might be cited, show that the Court will always control the process in bankruptcy, when it is used for purposes inconsistent with the intention of the act of parliament.

The counsel for the petition then proceeded to show that the petitioner was not a trader.

Sir JOHN CROSS.—As the fact of the trading depends upon so many affidavits, it may be unnecessary to go into that question, unless the counsel for the petitioning creditor can establish an act of bankruptcy under the act of parliament; the onus of doing which lies on them. I think, therefore, the other side should be now called upon to prove the act of bankruptcy.

Mr. Bacon, and Mr. Goodeve, for the petitioning creditor. The tender made of the payment of the debt to Mr. Charge's clerk was made at a time, when the bankrupt and his solicitor well knew that Charge would not be at home to receive it. The notice requiring payment of the debt was served on the 31st August. The bankrupt swears that on the 8th September he was

(a) 3 Deac. 405.

making arrangements for the payment of the money; and yet he does not attempt to make any tender of it before the 18th September. When *Charge* left home at the usual period which he was accustomed to do, which was not till more than a week had expired after the service of the notice under the act of parliament, he had no reason whatever to suppose that it was the bankrupt's intention to pay the money. His absence from home, which prevented the payment, must be taken to have been merely accidental; but even his absence need not have prevented the payment of the money by the bankrupt, or his complying with the other condition of the act of parliament. After the bankrupt had delayed so long to make the tender, when he found that no one was authorized to receive the money in the absence of Mr. *Charge*, he ought to have resorted to the other mode pointed out by the act of parliament, and have given security for it, if he did not choose to follow *Charge* to Redcar and make a personal tender of the money. [Sir *John Cross*. The money was tendered on the 18th day to *Charge's* managing clerk. Could not the clerk write to him, to know whether he would authorize him to receive the money? I do not find, that *Charge* any where swears that he did not know that the bankrupt had tendered the money in his absence.] The bankrupt never gave *Charge* notice that he intended to pay the money; nor did *Charge* suppose it was possible, from the pecuniary difficulties under which he laboured, that he could pay it. The petitioning creditor, after serving the affidavit and notice under the act of parliament, is to remain perfectly passive; and it is for the debtor to take the proper steps to comply with the other requisitions of the act. [Sir *John Cross*. I think it lies upon you to show,

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that the money was not paid by reason of the default of the bankrupt : you must prove some default on his part.] Our case is, that *Charge's* movements were watched by the bankrupt, and that he purposely delayed the tender of the money, till he knew that *Charge* was from home.

But the Chesterfield Canal Company also proceeded under the act of parliament to make the petitioner a bankrupt; and the adjudication was founded as well on that proceeding, as on the proceeding of the petitioning creditor. In order to prove the service of the affidavit of debt, and the notice requiring immediate payment of it, we have the affidavit of Mr. *Elliot*, who describes himself as the agent of the company, and duly authorized in that behalf.

Mr. *Anderdon* objected to this affidavit being admitted, as evidence that *Elliott* was authorized by the company to proceed under the act of parliament, for the purpose of making *Gratton* a bankrupt. Even where the officer of a public company is authorized to bring actions and suits for the company in his own name, that does not authorize him to sue out a fiat in bankruptcy for the company; *Guthrie v. Fish* (a).

Mr. *Bacon*, and Mr. *Goodeve*. If a creditor is abroad, or unable to make his personal deposition under a fiat in bankruptcy, any other person duly authorized can make it for him. So, before this act of parliament, the clerk of a trader could make an affidavit to ground an arrest for debt. As such an affidavit, therefore, would be sufficient to hold a defendant to bail in an action, it is a sufficient affidavit within this act of parliament. The

(a) 3 B. & C. 178

words "in this behalf," which are contained in *Elliott's* affidavit, are not confined to the making of the particular affidavit, but must be taken to apply to the whole proceedings under the statute in question. Now, the solicitor to the company swears that he was instructed by them to take proceedings under the act, for the purpose of making *Gratton* a bankrupt; and the two affidavits taken together must be received as evidence of the fact of agency. The notice to pay the money also states, that the party giving the notice was authorized in that behalf.

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Sir JOHN CROSS.—The words of the act of parliament are "if any creditor shall file an affidavit, and shall cause him (the trader) to be served personally with a copy of such affidavit, and with a notice in writing requiring immediate payment of such debt." Now, it is not stated in any affidavit, that *Elliott* was authorized to demand the payment of the debt. It is true, that in *Charge's* affidavit it is stated, that the company caused an affidavit to be filed, and other proceedings to be taken under the act, for the purpose of making *Gratton* a bankrupt; but I think that this does not identify the agency of *Elliott*, so far as to prove that he was authorized to demand the payment of the money.

Mr. *Cockerell*, and Mr. *J. Russell*, for the assignees, contended, that the bankrupt purposely delayed to make the tender of the payment of the debt, until *Charge* had left home; and that it was no where sworn by him, that he did not know of *Charge's* absence when the money was tendered, nor that it was his practice to leave home at that period of the year.

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Sir JOHN CROSS.—This petition prays that the fiat may be annulled, upon the ground (amongst others) that the bankrupt has not committed an act of bankruptcy; and it is narrowed to this question, namely, whether the act of bankruptcy alleged to have been committed is within the meaning of the 8th section of the 1 & 2 Vict. c. 110. s. 8.; that is, whether the bankrupt, within twenty-one days after personal service of the affidavit of the petitioning creditor, and the notice requiring immediate payment of his debt, did actually pay the debt, or secure or compound for the same to the satisfaction of the creditor. If the bankrupt has made default in either of these requisitions, within the meaning of the act of parliament, the bankruptcy will not be disturbed; unless the object of the petitioning creditor was not to recover his own debt, but to seize the effects of the bankrupt, in a more speedy way than by a pending action, to satisfy the claim of third parties. The circumstances are these: *Charge*, the solicitor to the Chesterfield Canal Company, held a mortgage of some property from the bankrupt, for no less a period than thirteen years, during which the interest was regularly paid by the bankrupt. It so happened, however, that the last half year's interest was not paid when it fell due; and on its being demanded, notice was given by the bankrupt of his intention to pay off the mortgage within six months, or sooner, if required. The parties were near neighbours to each other; and the only notice, which *Charge* took of this intimation of the bankrupt to pay off the mortgage debt, was, to make a demand of immediate payment of the debt, and file an affidavit under the provisions of the 1 & 2 Vict. c. 110., for the purpose of making *Gratton* a bankrupt. It appears, that for the first week

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after this proceeding *Gratton* was unable to raise the money; and at the expiration of that week *Charge* left home, after locking up the mortgage deed. *Charge* says that he did not go out of the way, to avoid a personal tender of the debt; but it happened, somehow or other, that he did keep out of the way for a whole fortnight of the three weeks which are limited by the statute for the payment of the debt. During his absence, a relation of *Gratton's* went to his bankers at Chesterfield, who were also *Charge's* bankers, and gave them notice to provide a sufficient sum out of certain funds in their hands for the payment of the mortgage. It would seem, therefore, that the debtor was anxious to pay his debt, and the creditor equally anxious to avoid receiving it. On the 18th September a tender of the principal and interest due on the mortgage was made to *Charge's* managing clerk, which was refused as insufficient, on the ground of the tender being made in country bank notes. Upon this objection being made, Bank of England notes were obtained, and a second tender made the same day to the managing clerk at *Charge's* office. The money was counted on the table, in the presence of the clerk, but again refused. Under these circumstances the fiat issued. Now, it has been said, why did not *Gratton* follow *Charge* in his round of excursion, or write a letter to him to say that he was ready to pay the money. I think he did a great deal better. He counted the whole money out to the clerk, who was left to manage *Charge's* business in his absence. Did not *Charge* know of this tender? I have anxiously looked at his affidavit, to see whether all knowledge of it is disputed by him. He says, that he did not receive any intimation from his

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bankers that it was intended to pay the money, and that during his absence at Redcar, he had only the ordinary communications with his own clerks. I have no doubt, from the language of his affidavit, that he did receive information from his clerk, that the tender had been made; and that his object was to prevent *Gratton* from paying the money, until after the expiration of the twenty-one days limited in the statute. It was clearly the object of *Charge* to delay the payment of the debt beyond the period of twenty-one days,—while it is equally clear, that the debtor had both inclination and ability to pay within that time. The nonpayment of the money, therefore, which constituted the act of bankruptcy, was the act of the creditor, and not of the debtor; and yet the creditor has sworn that the bankrupt made default in the payment of the money within the twenty-one days after the demand of payment. The petitioning creditor was here the consenting and concerting party to the act of bankruptcy, and therefore cannot avail himself of it. It is, perhaps, unnecessary to add, that I am also of opinion, that the fiat was sued out by the petitioning creditor, not for the purpose of obtaining payment of his own debt, but for another and wholly illegitimate purpose.

Fiat annulled, with costs.

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Ex parte WHITBREAD and others.—In the matter of

JOSEPH DIX.—

Serjeants' Inn
Hall,
December 10.

THIS was the petition of equitable mortgagees for the usual Order, and for leave to bid at the sale.

By indenture of lease dated 30th April 1825 between *John Cocker* of the one part, and *Susannah French* of the other part, certain premises were demised to *Susannah French* for twenty-one years from the 25th March 1828, at the yearly rent of 60*l.*; and, by indenture of assignment dated the 2nd December 1839, these premises became vested in the bankrupt for the remainder of the term.

By another indenture of lease dated the 24th October 1839 between *Alfred Richard Cocker* and *Francis Goodrich* of the first part, *John Cocker* of the second part, and the bankrupt of the third part, the same premises as were comprised in the first lease, together with certain other premises therein described, were demised to the bankrupt, to hold from the 29th September then last for the term of forty-six years wanting ten days, subject to the first mentioned lease.

At the time this last mentioned lease was granted, the petitioners lent to the bankrupt the sum of 1683*l.*; whereupon the bankrupt deposited that lease with the petitioners to secure the payment of that sum with interest at 5*l.* per cent., and all such further sums as might become due from him to the petitioners for goods sold and delivered, money lent or paid, or on any other account, such sums not exceeding (including the sum of 1683*l.*) the sum of 2000*l.*

The bankrupt, being the lessee under a lease for forty-six years, subject to a former lease for twenty years, deposits it by way of equitable mortgage. He afterwards purchases the remainder of the term granted by the first lease, and deposits that lease also with the same party, for securing a further sum. Held, that the first lease was not under these circumstances merged in the second, and that the depositaries were good equitable mortgagees under both deposits.

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On the 31st October 1839, the bankrupt stood indebted to the petitioners in the sum of 500*l.* for money lent and advanced to him on the 25th March in the same year.

When the bankrupt completed the purchase of the first mentioned lease of the 30th April 1825, the petitioners advanced him the sum of 1469*l.* 19*s.* 5*d.*; to secure the repayment of which, he deposited with them such first mentioned lease and the several assignments thereof. Shortly after this advance, an account was stated between the bankrupt and the petitioners, whereupon the bankrupt gave the petitioners a promissory note for 3652*l.* 19*s.* 5*d.*, being the amount of the three several sums of 1683*l.*, 500*l.*, and 1469*l.* 19*s.* 5*d.*, payable on demand, with interest.

The fiat issued on the 19th July last, when there was due for principal and interest on the promissory note the sum of 3939*l.* 8*s.* 9*d.*

Mr. *Romilly*, in support of the petition. The objection on the other side is, that the first lease was merged in the second, and therefore that the deposit of the first lease with the petitioners is an invalid security. The second lease, however, was granted, subject to the preceding lease, which had then ten years to run; and when the bankrupt made the deposit of the second lease, he was not in possession of the property under the first lease; for the second lease was dated and deposited by the bankrupt on the 24th October 1839, but the bankrupt did not purchase the remainder of the term granted by the first lease until the 2nd December 1839. To enable him to complete this purchase, the petitioners lent him 1469*l.*; and to secure the repayment of this sum, the bankrupt deposited

with them the first lease and all the mesne assignments thereof. It is submitted, that it is not because the bankrupt purchased in December the remainder of the term granted by the first lease, that the first lease is to be considered as merged in the second; but, whether it was merged, or not, the bankrupt was still entitled to the larger term granted by the second lease. In *Ex parte Tuffnell* (a), where a bankrupt, having a mortgage term, deposited the mortgage deed with a party by way of equitable mortgage, and afterwards purchased the equity of redemption; it was held, that the whole of the bankrupt's interest in the property ought to be sold, and the assignees to join in the conveyance to the purchaser. It was never there suggested, that the mortgage term was merged, because the bankrupt afterwards purchased the equity of redemption.

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Mr. *Anderdon*, *contra*. The very instant when the bankrupt took the conveyance of the former lease, that lease was merged in the second. We do not dispute, that the petitioners are entitled to the sum of 2000*l.* out of the proceeds of the sale of the second lease, by virtue of the first deposit. But the second deposit of the original lease gave no interest whatever to the petitioners; as, when that deposit was made, the term granted by the original lease had become merged in the second. As the second deposit therefore conveyed no interest, it could not operate by way of charge. The first deposit is made a better security by the merger; but the second deposit is worthless. In *Stokes v. Russell* (b), where the tenant of a term conveyed the term by way of mortgage, and

(a) 1 Mont. & A. 620; 4 Deac. & C. 29.

(b) 3 T. R. 678.

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then joined with the mortgagee in a lease for a shorter term, in which the covenants for the rent and repairs were only with the mortgagor and his assigns, and the reversioner afterwards acquired the estates of the mortgagor and mortgagee; it was held, that the reversioner could not bring an action against the lessee for breach of covenant, as the term of the mortgagor was merged in the freehold. The second deposit was made without any written memorandum, and is a gross evasion of the Statute of Frauds, which was intended to prevent any interest in lands being conveyed, except by some instrument in writing.

Mr. *Romilly*, in reply, was stopped by the Court.

Sir JOHN CROSS.—I am not able to feel any doubt whatever in this case. It appears, that the bankrupt in October 1839 deposited the second lease with the petitioners for securing the sum of 2000*l.*, which second lease was granted subject to the first lease. After this transaction, the bankrupt in December following purchased the remainder of the term granted by the first lease; and it is said, that by so doing the first lease became merged in the second lease. But merger and extinguishment are now considered as matter of intention. Could not the bankrupt do this—Could he not go to the mortgagees and say to them: “You are now the holders of a lease subject to the term granted by a former lease, which will not expire for ten years yet to come; I have now purchased the remainder of this outstanding term, and have therefore enlarged my interest in the demised premises; your security is now subject to the original lease, but if you will lend me a further sum of

money, I will now deposit with you the original lease?" Is there any legal objection to a transaction of this nature? And had not the bankrupt a right, if he chose, to keep on foot the term first granted, and to treat the original lease as a still existing lease? Something has been said about the operation of the Statute of Frauds, in regard to these deposits; but I think it is a matter of great commercial convenience that they should be allowed; and it is now too late to dispute their legality, after they have been so long recognized by Courts of equity. In the present case, I am of opinion that the petitioners were equitable mortgagees of the demised premises by virtue of both deposits, and that their lien on the property extends not only to the sum of 2000*l.* under the first deposit, but also to the sum of 1469*l.* intended to be secured by the second deposit. If I felt any doubt on this subject, as the question is one appertaining to the law of real property, I should pause before pronouncing my judgment; but the case really appears to me quite free from doubt.

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and others.

Mr. *Anderdon* then applied for costs, as there was no written memorandum accompanying the last deposit.

Sir JOHN CROSS.—The petitioners must pay costs, as there was no memorandum in writing.

Usual Order as on a parol deposit.



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Hall.*

December 10.

Neither the petitioning creditor, nor the solicitor, can petition for the payment of the costs up to the choice of assignees, without alleging and proving that the Commissioners made an Order for the payment of them.

Seemle, that the solicitor cannot petition for the payment of these costs, without the privity of the petitioning creditor.

Ex parte COOPER.—In the matter of JOHN JONES and another.—

THIS was the petition of a solicitor for the payment of his costs of working the fiat up to the choice of assignees.

Mr. *Younge*, in support of the petition, relied on *Ex parte Benson* (a), where two of the judges of this Court held (Sir *J. Cross dissentiente*), that the solicitor to the petitioning creditor may petition that the assignees may pay him the amount of the petitioning creditor's costs. [Sir *J. Cross*. The statute (b) directs, that the Commissioners shall, under their hands, make an Order for the payment of these costs. Now I must see that Order, before I can dispose of this petition.] There is an allegation in the petition, that the costs were taxed by the Commissioners at 4*l*.

Mr. *Anderdon*, *contrà*. In *Ex parte Haynes* (c), Sir *J. Leach* refused to make any Order on a petition by the solicitor for the payment of the costs up to the choice of assignees, saying, that the demand of the solicitor is properly upon the petitioning creditor, and not upon the assignees. There is no allegation in the petition, that the solicitor in this case has not been paid by the petitioning creditor, or that he was authorized by the petitioning creditor to make this application. A necessary ingredient, to found any application for the payment of these costs, is the Order of the Commis-

(a) 2 Mont. & A. 582.

(c) 1 G. & J. 35.

(b) 6 Geo. 4. c. 16. s. 14.

sioners, and that is wanting here. That is a cause of demurrer on the face of this petition.

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Mr. *Younge*, in reply. The allegation in the petition, that the bill was duly taxed by the Commissioners, implies that they made an Order for the payment of it; which Order is invariably written at the foot of the bill of costs.

Sir JOHN CROSS. — It is material in this case to look to the very words of the act of parliament. The 6 *Geo.* 4. c. 16. s. 14. directs, that the petitioning creditor shall, at his own costs, sue forth and prosecute the commission until the choice of assignees, and that “the Commissioners shall, at the meeting for such choice, ascertain such casts, and by writing under their hands direct the assignees (who are hereby thereto required) to reimburse such petitioning creditor or creditors such costs out of the first money that shall be got in under the commission.” The Commissioners are therefore to direct the assignees to pay such costs; and the right of the petitioning creditor to receive them is entirely derived from such an Order. Now it is not denied, that there is such an Order. Unless therefore I can see the Order of the Commissioners, directing the assignees to pay these costs, I do not see how I can order them to be paid to any body. There is another difficulty in the case, which is this: that if the solicitor is allowed to come here and obtain an Order for the payment of the costs of the petitioning creditor, what will prevent the petitioning creditor himself from coming here afterwards and obtaining a similar Order? I do not wish to give now any decisive opinion as to which party ought to

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petition for payment of these costs, whether the petitioning creditor, or the solicitor; but neither the one nor the other can come here, without producing the Order of the Commissioners for the payment of the costs. And I would advise, that, on future occasions of this kind, the solicitor should not come here, without the privity of the petitioning creditor.

Petition dismissed, with costs.

Serjeants' Inn
Hall,
Dec. 11 & 13.

Ex parte ALEXANDER LEVI NEWTON.—In the matter of
ALEXANDER LEVI NEWTON.—

The bankrupt and R. had various bill transactions with each other, which were entered in a regular debtor and creditor account current. R. proved on four of the bills credited in the account for the sum of 800*l.*, and afterwards brought an action against the bankrupt, to recover the amount of four other bills, amounting to 620*l.*, which were also included and credited in the account current, and which were returned dishonoured to R. after he had proved for the 800*l.* Held,

THIS was a petition for an injunction to stay an action at law against him on certain bills of exchange.

The petition stated, that previous to the date and issuing of the fiat, the bankrupt had dealt with one *Julius Reinhold* in the way of his business as a merchant, and that, in the course of such dealing, the bankrupt, from time to time, advanced and paid to him various sums of money, and accepted, indorsed, and delivered over to him various bills of exchange, by means whereof an account current arose between them. On the 27th May 1841, *Reinhold* made out and stated a general account current of the dealings and transactions which had so taken place between himself and the bankrupt, and delivered such account signed by him to the bankrupt. In this account *Reinhold* debited the bankrupt with the sum of 3190*l.* 18*s.* 8*d.*, of which sum the

that these two sums of 800*l.* and 620*l.* must be considered as distinct and separate debts, and that the proof for the one did not prevent the creditor from suing the bankrupt for the other.

bankrupt, before the date of the fiat, paid to him the sum of 1459*l.*, leaving a balance of 1731*l.* 18*s.* 8*d.* due from the bankrupt. *Reinhold* also credited the bankrupt with the bills of exchange accepted or indorsed by *Reinhold*, and also with the payments made by cheque, or otherwise, to him, amounting in the whole to the sum of 3189*l.*, leaving a balance due upon the face of the account of 11*l.* 18*s.* 8*d.*

The fiat issued on the 22d June 1841. At the first public meeting, held on the 16th July 1841, *Reinhold* proved on four bills of exchange credited in the general account current, amounting to the sum of 800*l.*; and at the same meeting Messrs. *Jones* and Son proved two other bills of exchange also credited in such account, and which had been indorsed and passed to them by *Reinhold*, amounting together to the sum of 300*l.* *Reinhold* voted in the choice of assignees, in respect of the aforesaid debt, and chose himself and two other persons, as creditors, assignees under the fiat. Notwithstanding this proof, *Reinhold*, on the 15th October last, commenced an action at law against the bankrupt, to recover the sum of 620*l.*, being the amount of four several other bills of exchange included and credited in the said account current, which did not fall due until after *Reinhold* had made his proof for the 800*l.*

The petition alleged, that not one of the four last mentioned bills of exchange, upon which the action was brought, and which were credited in the general account current,—nor any other of the bills of exchange included and credited in such account current, was given by the bankrupt in payment of any specific or distinct transaction between the bankrupt and *Reinhold*, but were respectively given to *Reinhold* as payment generally, on

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account of the dealings and transactions between them; and that the debt of 800*l.*, so proved by *Reinhold* upon the aforesaid four bills of exchange, was part of his demand comprised in such account current.

The petitioner submitted, that *Reinhold*, by proving this debt, elected to go in under the fiat, in respect of his demand arising upon the aforesaid general account current, and that he ought to be restrained from further proceeding in the action.

Mr. *Keene*, in support of the petition. As all these bills of exchange were included in the account current stated by *Reinhold*, and formed but one demand, he cannot, after proving on four of the bills to the amount of 800*l.*, sue the bankrupt on four other bills, which formed part of the same account. This is quite a different case from one where the demands are separate and distinct. *Reinhold* has already proved for items which formed part of the settled account, and he cannot now bring an action for other items of the account. The bills included in the account were different securities for the same debt; and therefore he cannot sue on some of the bills, and come in as a creditor under the fiat for others; *Ex parte Crinsoz* (a). So, where two bills are given for a general balance, it has been held that the creditor cannot prove for one, and sue on the other; *Ex parte Dickson* (b). By the 6 Geo. 4. c. 16. s. 59. it is declared, that the proving or claiming a debt under a commission by any creditor shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved or claimed. Now, in the present case, the creditor has

(a) 1 Brown, 270.

(b) 1 Rose, 98.

elected, by proving on the four bills for 800*l.*; which, as well as those he has sued upon, were all credited in the general account current, and composed different parts of the same debt. The circumstance of the bills happening to be dishonoured, after the settled account in which they were included, does not alter the nature of the demand. [Sir *John Cross*. It does not strike me, that the circumstance of the bills being inserted in the account current is of much importance in the case. The material question is, whether the bills were given for one dealing or transaction.] In *Ex parte Glover* (a) it was held, that the proof or claim by a creditor for any debt operates as a relinquishment of an action previously brought for a distinct demand.

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Mr. *Anderdon*, *contra*. It is clear, that the consideration given for these bills was perfectly distinct. The proof for the 800*l.* was on the bills then in the hands of *Reinhold*. The bills which were afterwards dishonoured, and in respect of which the action is brought, he had no power to prove, when the proof for the others was made. [Sir *John Cross*. It does not appear that there were any dealings between these parties, except on these bills. What difference is there in principle between a debt for goods sold and delivered, and a debt for bills of exchange sold and delivered?] In *Ex parte Sly* (b), it was held, that a creditor for goods sold might prove on a bill for part of the debt, and proceed at law on a bill for the remainder, which he had negotiated before the bankruptcy, and taken up after the proof. That case therefore decided, that, notwithstanding two bills may be given for the same debt, yet where

(a) 1 G. & J. 270.

(b) 2 G. & J. 163.

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one is negotiated, and comes back unpaid to the creditor, it then constitutes a separate debt. In the case of *Ex parte Dickson* (a), which has been relied on by the other side, the creditor had both the bills in his possession at the time he proved, and might then have proved on both; but here the creditor could not prove on the bills in question, for they were not then in his hands, nor were they then dishonoured. In *Ex parte Schlesinger* (b), the Vice-Chancellor took the distinction, that in that case both bills were dishonoured at the date of the commission, and before the proof of one, the creditor had notice of the dishonour of the other; but in *Ex parte Sly* the bills upon which the action was brought did not become due until after the proof of the fiat. When the creditor, in the present case, proved on the four bills for 800*l.*, he could not make his election as to proving on the bills which are the subject of the action; for he had not those bills then in his possession. As the creditor therefore had at the time of proof no power to elect, the case does not fall within the 59th section of the bankrupt law.

Mr. Keene, in reply. In *Ex parte Schlesinger* (c), the decision is completely in favour of the present petition; for there, the bill on which the action was brought was not returned to the creditor, until after he had proved on the other bill; and yet the Vice-Chancellor held, that both bills being given under circumstances which would have supported one action, the bill on which the creditor sued might have been proved, or at least claimed under the commission; and he therefore restrained the creditor from proceeding in the action on the second bill.

(a) 1 Rose, 98.

(b) 2 G. & J. 392.

(c) Ibid.

Sir JOHN CROSS.—I confess I have some difficulty in perceiving, when two bills are given for the same debt, how the circumstance of one of them being dishonoured renders it afterwards a distinct debt. Suppose a man owed 300*l.*, and gave his creditor two bills in payment of the debt, one for 100*l.*, and the other for 200*l.* The creditor cannot prove for the amount of both bills, if one of them has been negotiated by him; but he may elect to prove for that portion of the debt which is provable by him; namely, for that bill which he retains in his possession. The question is, therefore, whether he has not proved for an integral part of the same debt.

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Mr. *Anderdon*. If a new right of action accrues to a creditor, after he has made his proof, cannot he sue the bankrupt, notwithstanding he has proved under the fiat?

Sir JOHN CROSS.—If the bill, being dishonoured after the bankruptcy, creates a new debt, then, according to that reasoning, the creditor could not prove the bill under the fiat; but it has been a long time the law, that a bill, though not due until after the bankruptcy, may nevertheless be proved, and even though not due at the time of proof. The question is here, whether the creditor has not made his election to prove for such part of the debt as he could then prove, as well as for the remainder, which became payable afterwards. I am certainly disposed in this case, if I can do it, to follow Lord *Eldon's* principle in *Ex parte Dickson* (a), and to give the bankrupt the benefit of the 59th section of the statute, as it is a remedial law, and ought to receive a liberal construction. But as the cases are somewhat conflicting, I should wish to consider the point.

(a) 1 Rose, 98.

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Sir JOHN CROSS now delivered his judgment as follows:—This is a petition of the bankrupt, complaining that a creditor, who has proved under the fiat, has subsequently brought an action against him on four bills of exchange, which, it is contended, formed a portion of the same debt, for part of which the proof was made; and praying, therefore, a stay of proceedings in the action. I have looked through all the authorities on this subject, with an anxious desire to give all the remedy that I could to the bankrupt. The first question is, whether the sum already proved by the creditor, and the sum for the recovery of which he has brought an action against the bankrupt, constitute together one and the same debt. The only cases which apply to the facts of the present case are, *Ex parte Dickson* (a), and *Ex parte Sly* (b); for in all the other cases the proof and the action were for distinct debts. *Ex parte Dickson* was a case, where two bills, one for 100*l.*, and the other for 92*l.*, were given by the bankrupt for a general balance owing from him to a creditor; the 100*l.* bill not being paid when due, he brought an action on it, and took the bankrupt in execution; and the 92*l.* bill was shortly afterwards returned to him dishonoured, and he took it up and proved it under the commission. Under these circumstances the bankrupt applied to be discharged out of execution, on the ground that the proof was an election to relinquish the action, and come in under the commission; and Lord *Eldon* made the Order on the creditor, without prejudice to his proving under the commission. That case was referred to in the subsequent one of *Watson v. Medex* (c), which occurred in the Court of King's Bench. There two parcels of goods were sold to the bankrupt at different

(a) 1 *Rose*, 98.(b) 2 *Gr. & J.* 163.(c) 1 *B. & Ald.*

times, and paid for by bills; and the vendors proved under the commission for the amount of the first parcel, they then holding the bill given in payment for the same; the bill for the other parcel having been negotiated by them prior to the bankruptcy, and being then outstanding, was afterwards dishonoured; and it was held, that the vendors were not precluded by the statute 49 Geo. 3. c. 111. s. 14. from suing the bankrupt for the amount of the last parcel of goods. In that case Lord Tenterden, then Mr. Justice Abbott, in giving his judgment, says: "There is a manifest difference between the language of the two parts of this section; the first part enacts, that the creditor, who has brought any action in respect of any demand which arose prior to the bankruptcy, or might have been proved as a debt, shall not prove a debt under such commission, or have a claim for a debt entered upon the proceedings, without relinquishing such action. Upon this part of the section the decision by the Lord Chancellor in *Ex parte Dickson*(a) took place. The second part of the section says, that 'the proving or claiming a debt under a commission shall be deemed an election by such creditor, with respect to the debt so proved or claimed,' thereby, as it appears to me, tying up the election, and confining it to the particular debt 'so proved or claimed.'" The enactment on this subject in the 59th section of the 6 Geo. 4. c. 16. is expressed in the same words. The question is therefore in the present case, whether the sum of 800*l.* for which the proof was made, and the sum of 620*l.* for which the action was brought, are parts of the same debt, or whether they are to be considered as different debts. I certainly am not able to distinguish, from the

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(a) 1 Rose, 98.

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account current, whether they are different debts or not. But in *Ex parte Sly* (a), Sir *John Leach* held, that the account current was not decisive of the question; for he says: "That it was originally one debt upon an account current, is clear; and the question now is, does it still remain so? The petitioner was indebted generally for goods sold and delivered, for which he gave two bills. When bills are given, the debt becomes assignable by the mere transfer of the bills; and the creditor, having thus received an assignable debt before the bankruptcy, by parting with one of the bills, assigns so much of the debt, and the holder is from that moment the creditor of the bankrupt, and during the interval of his possessing the bill is the only one who could prove it. At the time, therefore, that the creditor proved one part of the debt, he had assigned the other, not only in equity, but at law. After the bankruptcy, he receives what may be termed a re-assignment; that is, he gets back the bill by payment. He is thus a creditor of the bankrupt upon an entirely new debt; and I must decide, that this is not a proceeding at law for the same demand for which the proof was made." Now I am unable to discover any difference in principle between that case and this; and, therefore, without expressly overruling the authority of *Ex parte Sly*, I cannot decide this case in favour of the petitioner. In dismissing the petition, however, it must be without costs.

Petition dismissed, without costs.

(a) 2 G. & J. 163.

Ex parte SHEPPARD.—In the matter of *BARLOW.*—

THIS was a petition of the vendor of certain shares in the United States Bank, claiming a lien on the shares for such part of the purchase money as was unpaid, and praying, as in the case of an equitable mortgagee, that the shares might be sold, and that he might be at liberty to prove for the difference. It appeared that the bankrupt had contracted to buy these shares of the petitioner for 2700*l.*, a small part only of which he had paid, and the certificates of the shares were left in the hands of the petitioner, as a security for the amount of the purchase money.

Mr. Ellison, in support of the petition. If the assignees choose to take these shares at the price agreed upon, the petitioner will be happy to transfer them and receive the money. They have, however, refused to do so; and therefore the case falls within the principle of *Ex parte Twining (a)*, lately decided by this Court; where a quantity of tea having been sold to the bankrupt, who only paid a part of the price before his bankruptcy, and the warrants for the delivery of the tea remaining in the possession of the vendors; it was held that the vendors had a lien on the tea for the unpaid purchase money, and that the right course of proceeding was for the vendors to apply to this Court for an Order for the sale of the tea. The previous case of *Ex parte Moffatt (b)*, also, recognized the right of an unpaid vendor to sell the goods, if he had not parted with the possession of them, and to prove for the difference.

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Where a bankrupt had contracted to buy some shares in the United States Bank, the certificates of which were left in the hands of the vendor, as a security for the payment of the greatest portion of the purchase money: *Held*, that the vendor was entitled, as in the case of an equitable mortgagee, to an Order for the sale of the shares, in satisfaction of the unpaid purchase money, with liberty to prove for the difference.

(a) 1 Mont. Deac. & D. 691.

(b) *Ibid.* 282; S. C. on Appeal, *ante*, p. 170.

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Mr. *J. Russell*, for the assignees. Here there was never any provable debt; but only a breach of contract, where the damages are uncertain and unliquidated, and therefore cannot be proved. In *Boorman v. Nash* (a), where a trader, who had contracted for the purchase of a certain quantity of oil for a certain price, to be delivered at a future day, became bankrupt before that day arrived; it was held, that the vendor could not prove the amount of the price under the commission, and therefore that the certificate of the bankrupt was no bar to an action against him for not accepting and paying for the oil. The same principle was also acted upon in *Green v. Bicknell* (b). In that case *G.* agreed to sell to *B.* all the oil which should arrive by a certain ship, which *B.* was to receive within fourteen days after the landing of the cargo, and pay for at the expiration of that time by bills or money, at a specified price per tun, with customary allowances. When the ship arrived and the cargo was landed, *G.* tendered the oil to *B.* at the end of the fourteen days; but, the market price of the oil being then lower than the contract price, *B.* refused to accept the oil. Under these circumstances, it was held by the Court of Queen's Bench, that, *B.* having become bankrupt after the refusal, *G.* could not prove for this breach of contract under the commission; for that, although *G.*'s claim would be measured by the difference between the contract and market prices at the time when *B.* should have fulfilled his contract, yet the *data* on which the calculation must proceed were not so settled as to admit of no dispute, and render the intervention of a jury unnecessary; and consequently the

(a) 9 B. & C. 145. See note on this case, 3 Deac. & C. 802.

(b) 8 Adol. & E. 701.

claim of *G.* was not for a debt, but for damages. Both these cases decide, that if *A.* agrees to buy of *B.* goods of a certain quantity, at a certain price, to be accepted and paid for at a future day, and the breach of contract is not till after *A.* becomes bankrupt, *B.* has not a provable debt; and the circumstance of part of the purchase money having been paid before the bankruptcy, makes no difference in the case. In *Green v. Bicknell* (*a*), both the price and the quantity of the oil were ascertained before the bankruptcy; and yet, if the purchaser had refused to pay one farthing of the sum agreed upon, the vendor could only have brought an action against him for damages occasioned by the breach of contract. The rule appears to be this: that if *A.* is the vendor of a chattel, which passes by delivery, and the bankruptcy of the vendee intervenes between the sale and delivery, the vendor cannot prove under the fiat. The case of *Ex parte Moffatt* (*b*), that has been relied on, was decided on the custom of the tea trade. Here no custom of the trade has been alleged.

Sir JOHN CROSS.—This appears to me a very clear case. A sale of shares was effected between the petitioner and the bankrupt to the amount of 2700*l.* The bankrupt contracts to buy, but leaves the shares in the hands of the seller. The purchase was completed, though the money was *solvendum in futuro*. The bankrupt pays a few pounds on account, and the remainder of the purchase money is still due to the petitioner. It has been contended, that this is a demand for unliquidated damages; but the remainder of what is owing of the specified purchase money is the measure of all the da-

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(*a*) 8 Adol. & E. 701.(*b*) 1 Mont. Deac. & D. 282; 2 *Id.* 170.

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mages. In *Green v. Bicknell* (a), the refusal of the purchaser to take the oil was before the bankruptcy, and there was no pledge. In *Boorman v. Nash* (b), it was merely held that a bankrupt, notwithstanding his certificate, was liable to an action for not accepting and paying for a quantity of oil which he had purchased, and which was not to be delivered till a future day, before which day the bankruptcy intervened. Neither of these decisions appears to me to apply to the present case. Here the vendor had a lien on the thing sold for the unpaid purchase money, and has the same rights as an equitable mortgagee. The Order must be, therefore, as prayed, with an allowance of the same costs, as an equitable mortgagee with a written memorandum is entitled to.

Order as prayed.

(a) 8 Adol. & E. 701.

(b) 9 B. & C. 145.

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Under a joint fiat, if the interests of the separate creditors require it, the Court will make an Order for the appointment by them of an inspector to collect in the separate effects, with authority to bring actions &c. in the names of the assignees.

Ex parte WRIGHT and others.—In the matter of
DAINTRY and RYLE.—

THIS was the petition of some of the separate creditors of the bankrupt *Ryle*, alleging that the debts and credits of his separate estate amounted to a large sum, and praying that an inspector might be appointed to watch over the interests of the petitioners, and the other separate creditors of his estate.

Mr. *Anderdon*, in support of the petition, said, that it would not answer in this case to have a new choice of assignees, for the purpose of electing one of the separate creditors; and that the order which the Court made in

Ex parte Ackroyd (a) for the appointment of an inspector, where the interests of the assignees were adverse to those of the general creditors, had been found to work well.

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Sir JOHN CROSS.—There is no question in this case, as to the propriety of appointing an inspector; the only question is, as to his powers. I think that an inspector should be appointed at a meeting of the separate creditors duly called for that purpose, and that he should be authorized to collect in all the separate debts, with authority to bring actions in the names of the assignees, upon giving them a sufficient indemnity.

The ORDER was, that a meeting of the separate creditors of *Ryle* should be held, with liberty for such creditors to appoint one or more person or persons to be an inspector or inspectors of his separate estate, who should be authorized to collect in all his separate debts and effects, and to bring actions in the names of the assignees for the purpose of realizing his separate estate, upon entering into a proper indemnity to the assignees against the costs in such actions; that the inspector should pay all monies received by him into the hands of the bankers already appointed by the creditors; that the inspector should have free access to all books and papers relating to such separate estate, with liberty to take copies thereof, or extracts therefrom; and that the costs of this petition, and the execution of the Order should be paid out of the separate estate.

(a) 1 Mont. Deac. & D. 555.

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The bankrupt's goods having been seized in execution nearly five years ago, the solicitor to the fiat, without the authority of the assignee, gave an undertaking to the sheriff's officer to indemnify him against the consequences of his relinquishing the possession of the goods, and returning *nulla bona*. *Held*, that he had not, by reason of his liability on this undertaking, any lien upon the bankrupt's money in his hands.

Ex parte WILLIAM WHITE.—In the matter of  
 CATHERINE ALEXANDRINA HALLIN.—

THIS was a petition of the assignee of the bankrupt's estate, praying that the solicitor might be directed to pay to the official assignee the sum of 95*l.* 6*s.*, which he had received under the fiat so long ago as in the beginning of the year 1837. The solicitor acknowledged the receipt of the money, and that his bill up to the choice of assignees had been paid; but he claimed a lien on the money in his hands under the following circumstances. It appeared that previous to the issuing of the fiat, the bankrupt's goods had been taken in execution under three several writs of *fieri facias* for levying 75*l.* 2*s.* The solicitor alleged, that, after the petitioner was appointed assignee, he, the solicitor, with the sanction of the petitioner, prevailed on the sheriff's officer to give up the goods seized and return *nulla bona*, upon the solicitor giving an undertaking in writing to indemnify the sheriff from the consequences of making such return. That the solicitor accordingly gave this indemnity, and thereupon claimed to retain the 95*l.* 6*s.* until he was released from his indemnity, or until the execution creditors had released the sheriff, and also until the payment of his bill for business done in the bankruptcy since the choice of assignees, amounting to 28*l.* 17*s.*

The assignee denied, however, that he had ever authorized or requested the solicitor to give such an indemnity; nor was there any evidence adduced as to the nature of the alleged indemnity. The fiat was issued on the 25th February 1837, and the petitioner was chosen sole

assignee on the 24th March following; and on the 20th May last the solicitor was removed by the assignee.

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Mr. *Martindale*, in support of the petition.

Mr. *Anderdon*, *contrà*, said that it would be unjust to deprive the solicitor of the only security which he possessed to protect himself from the consequences of his indemnity to the sheriff, which he had entered into with the express sanction of the assignee. In *Ex parte Bowden* (a) it was held, that an official assignee could not, under the 1 & 2 Will. 4. c. 56. s. 22., take the bankrupt's money out of the hands of the solicitor to the fiat, without discharging his lien.

Sir JOHN CROSS.—It does not appear to me, that there is any analogy between this case and *Ex parte Bowden*. The solicitor received this money in the early part of 1837, nearly five years ago; and he now contends that he has still a right to retain it in his hands, because he at that distant period of time gave some undertaking or other to indemnify a sheriff's officer for relinquishing the possession of the bankrupt's goods, which he had seized under a writ of execution. There is no evidence whatever, as to what was the nature of that undertaking or indemnity; and, although it is stated in the solicitor's affidavit that the indemnity was given with the sanction of the assignee, yet it is sworn by the assignee, that he did not authorize or request the solicitor to give any such indemnity. There is no proof of any authority from the assignee; it must be taken therefore to have been the sole gratuitous act of the solicitor. If he had no autho-

(a) 2 Desc. & C. 182.

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rity therefore to give any such indemnity, he has acted contrary to law, in retaining this money so long in his hands, and preventing the distribution of it amongst the bankrupt's creditors. But, even supposing he had been authorized to give an indemnity, there is no evidence that he was ever called upon to pay anything by reason of his indemnity; and therefore there appears to be no justification for his retaining this money. Under all these circumstances, I think that the application has been very properly made by the creditors' assignee for the payment over of this money to the official assignee. Then, as to the claim for his costs incurred subsequently to the choice of assignees,—if a solicitor wrongfully retains a sum of money in his hands, he has no lien on it for his subsequent services. The Court, however, recommends it to the assignee to allow the amount of these costs out of the sum in question, by way of set off.

Order as prayed.

Ex parte WILLIAM DEAN and CHARLES WARWICK.

—In the matter of JOSHUA GIBSON, and JOSEPH M'GLASSON.—

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Where a solicitor was employed by the trustees under a trust deed, in the preparation of the deed and the execution of the trusts, and the trustees were

THIS was also a petition of assignees against the late solicitors to the fiat, praying that they might be ordered to pay over to the assignees two several sums of 84*l.* 1*s.* 4*d.* and 400*l.*

The fiat issued on the 8th February 1837.

afterwards chosen assignees under a subsequent fiat in bankruptcy issued against the party who had assigned his effects under the trust deed: *Held*, that the solicitor could not retain a sum which had come to his hands since the bankruptcy, in satisfaction of his charges relating to the trust deed.

The petitioners alleged, that upon an account stated between the assignees and the solicitors, after giving full credit to the latter for all payments made by them, and for the amount of their various bills of costs, there remained in their hands a balance of 84*l.* 14*s.* 4*d.*, for which they were accountable to the bankrupt's estate; and that on the 13th February 1837, which was after the issuing of the fiat, they received an order on the London and Westminster Bank for the sum of 400*l.*, for which they were also accountable as part of the bankrupt's estate. The solicitors, however, claimed to retain the 400*l.*, in satisfaction of their costs and charges for preparing a trust deed of the effects of the bankrupt, dated the 10th February 1837, and for payments connected therewith; under which deed the petitioners were trustees. The account which the solicitors rendered of these charges by payments, was as follows :

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|                                                                                                                                                                                                                                                                     |   |       |      |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|-------|------|
| Paid an accountant for investigating the<br>affairs of the bankrupts previous to their<br>bankruptcy, for assisting in procuring<br>the assignment, and for obtaining proofs<br>and powers of attorney after the bank-<br>ruptcy to carry the choice of assignees . | £ | s     | d    |
| Payments to other persons . . . . .                                                                                                                                                                                                                                 |   | 23    | 11 5 |
| Bill of costs of the solicitors . . . . .                                                                                                                                                                                                                           |   | 259   | 19 7 |
|                                                                                                                                                                                                                                                                     |   | <hr/> |      |
|                                                                                                                                                                                                                                                                     |   | £415  | 10 7 |
|                                                                                                                                                                                                                                                                     |   | <hr/> |      |

In answer to the allegations in the petition, the solicitors in their affidavit stated that they were ready to pay to the petitioners the balance claimed by them of 84*l.* 14*s.* 4*d.*, after deducting therefrom the sum of 17*l.* 14*s.* for the expences of a journey to Liverpool,



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undertaken by them at the request of one of the assignees; and that the accountant was not employed or retained by the solicitors, but by the petitioners and the other creditors of the bankrupts. The solicitors then went into a long statement justifying the amount of their charges, and stating that they always considered that the petitioner *Dean* fully approved of and acquiesced in their application of the sum of 400*l.* in payment of the above costs, and that he never objected to such application, although it was mentioned in the balance sheet of the bankrupts as having been handed over to the solicitors; and that at the audit meeting on the 4th July 1837, the petitioners disregarded all notice of the 400*l.*

Mr. *Anderdon*, in support of the petition, said that the case just decided of *Ex parte White (a)* must govern this.

Mr. *Keene, contra*. With respect to the sum of 84*l.* 14*s.* 4*d.*—the bill of costs of the solicitors was in their absence taxed by the Commissioners, and a charge of 17*l.* 14*s.* for attending a meeting at Liverpool was disallowed by the Commissioners, although the solicitors were specially requested by *Dean* to attend such meeting, and were obliged to take a journey from London to Liverpool for that purpose. They have a right therefore to deduct the amount of this charge from the balance claimed of 84*l.* 14*s.* 4*d.* As to the sum of 400*l.*,—the question is, whether, as this money was received under the trust deed, and the solicitors had therefore a lien on this sum, as against *Dean* and *Warwick* as the trustees under that deed, *Dean* and *Warwick* can now dispute

(a) See *ante*, p. 436.

this lien, and claim the whole sum in their character of assignees under the bankruptcy. As they originally employed the solicitors in their character of trustees under the deed of trust, they have no right now to throw off their character of trustees, and claim the whole of the money as assignees.

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Sir JOHN CROSS.—This is a petition of assignees calling upon the solicitors to pay over to them a sum of money, which formed part of the bankrupt's effects, and which was received by the solicitors subsequently to the issuing of the fiat, as well as a sum of 84*l.* 14*s.* 4*d.*, which the assignees claim as a balance on an account stated, after allowing the solicitors the whole amount of their costs as taxed by the Commissioners. That is the state of the case. There is no dispute that the 400*l.* was received by the solicitors after the bankruptcy; and the question is, whether money so received by them can be retained by them against the assignees, in satisfaction of a debt due to the solicitors before the bankruptcy from the assignees in their then character of trustees under a trust deed. The solicitors allege, that they were professionally retained in various matters relating to the preparation and the execution of the deed of trust; and if what they state is correct, there is no doubt but that they have a right to be paid by some person or other. But the question I have now to decide is a pure question of law, as to the administration of the effects of the bankrupts. The deed of assignment was void altogether; but this does not impair the right of the solicitors to sue the party who employed them to prepare it. It is another question, however, whether they have a right to pay themselves with the monies they have received under this fiat;

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and I am clearly of opinion, that they have no such right. This sum of 400*l.* therefore cannot be retained by them, but must be paid over to the assignees. As to the sum of 84*l.* 14*s.* 4*d.*,—it is equally clear that this is the balance of an account which has been settled and allowed by the Commissioners, who disallowed their charge for 17*l.* 14*s.*, which they now claim to deduct from this last mentioned sum. The Order must therefore be as prayed, for the payment by the solicitors of the two sums of 400*l.* and 84*l.* 14*s.* 4*d.*

Order as prayed.

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Hall,  
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Where a party has not come in as a creditor under the fiat, he cannot petition to stay the certificate.

Ex parte MEXTON.—In the matter of PROCTER

THIS was a petition to stay the bankrupt's certificate, under the 6 Geo. 4. c. 16. s. 130., on the ground that he had lost 20*l.* in one day by wagering. The charge against him was, that he had laid and lost a wager of 20*l.* that he would run a certain distance in a given time.

Mr. Keene was in support of the petition.

Mr. Chandless, *contra*, objected to the petitioner being heard, as he had not come in as a creditor under the fiat. In *Ex parte Dodson* (a), the Court refused to stay a certificate, upon the petition of a creditor who had not come in under the commission, and who had the means of trying the validity of the certificate at law.

Mr. Keene, in reply. Although a creditor has proved

(a) Buck, 225.

for a debt that does not amount to 20*L*., or has only entered a claim under the fiat, he can petition to stay the certificate; and it appears that although a creditor has had his proof rejected by the Commissioners, he is not thereby prevented from petitioning to stay the certificate, as well as to prove his debt; *Ex parte Pearse* (a).

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The COURT, however, decided in favour of the objection.

Petition dismissed.

(a) Mont. & B. 262.

Ex parte GEORGE THOMAS ROBERT REYNAL and others.

—In the matter of FREDERICK GYE and RICHARD HUGHES.

*Court of Bankruptcy, Basinghall Street, August.*

THE petitioners in this case had obtained an Order of the Court of Review, declaring them to be equitable mortgagees of certain property, called Vauxhall Gardens; which Order contained the usual directions for the sale of the property, and for an account to be taken of what was due to the petitioners, and that in case the Commissioner should find that any part of the property was claimed by the assignees, either as part of the personal estate of the bankrupts, or as being in their possession, order, or disposition at the time of their bankruptcy, the Commissioner was to state that fact, and keep a distinct account of the monies arising from the sale

The bankrupts purchased certain copyhold property, with various fixtures erected thereon, which were, in law, removable as between landlord and tenant, as well as on the principle of the benefit of trade. They afterwards mortgaged the property, together with all these fixtures, describing them precisely in the words used in the purchase

deed. After the mortgage, they erected on the premises some other fixtures of the like nature, and continued in the possession of the whole property up to the period of their bankruptcy. *Held*, that all these fixtures passed to the mortgagees, as parcel of the mortgaged estate, and were not to be considered as goods or chattels in the order and disposition of the bankrupts at the time of their bankruptcy, within the meaning of the 72d section of the 6 Geo. 4. c. 16.

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of the property so claimed. When the matter came before the learned Commissioner, the assignees claimed certain fixtures on the mortgaged property, as being goods and chattels in the possession, order, and disposition of the bankrupts at the time of their bankruptcy, by the consent and permission of the true owner, within the meaning of the 72d section of the 6 Geo. 4. c. 16.; and both parties agreed to abide by the decision of the Commissioner, as to their respective rights to the property in question. The material facts of the case, and the arguments of counsel, are fully gone into by the learned Commissioner in his judgment.

Mr. *Archbold* appeared for the petitioners.

Mr. *Keene* for the assignees.

MR. COMMISSIONER HOLROYD.—In this case the equitable mortgagees of certain copyhold property, and the assignees of the bankrupts, have agreed to submit to my decision upon the rights of the respective parties to certain trade and tenant's fixtures, claimed on the one hand by the mortgagees, as passing to them under their mortgage, and on the other hand by the assignees of the bankrupts, as part of the goods and chattels of the bankrupts, or as being in their order and disposition at the time of the bankruptcy.

Messrs. *Gye* and *Hughes*, the bankrupts, were the proprietors of Vauxhall Gardens. They purchased the property of Mr. *Barrett* in March 1825. The property was copyhold, held of the lord of the manor of Kennington.

The deed of covenant, under which the purchase is made, recites the agreement for sale of the said copyhold hereditaments, together with all the fixtures, scenery, paintings, tables, benches, and every other article and thing belonging to *Barrett*, in and about the said gardens. This recital is followed by a covenant to surrender all that substantial brick dwelling-house, called Spring Garden House, with the gardens thereto belonging or adjoining, usually called or known by the name of Vauxhall Gardens, and a piece of ground in the occupation of a Mr. *Solomonson* as tenant, and also all that piece or parcel of ground called the Coachfield, and the workshop, sheds, icehouse, great room, orchestra, covered walks, open walks, ways, passages, pavilions, boxes, and spring gardens, yards, and pond, and also an aqueduct to supply the said pond at Vauxhall creek. Some other premises are then mentioned, "together with all timber and timberlike trees standing or growing in or upon the said premises, or any part thereof, and all other the appurtenances to the said premises belonging."

By indenture made on the 27th November 1826, the bankrupts covenant to surrender the above mentioned property to Mr. *Reynal* and others, by way of mortgage, to secure to them a loan of 7000*l.*, with interest. On the 28th November 1826, a like covenant is made to secure a further sum of 7000*l.*; and on the 29th November 1826, a like covenant to secure a further sum of 8000*l.*

Surrenders were made in 1827, but no admission; Messrs. *Reynal* and others are therefore *equitable* mortgagees.

In the mortgage deeds the same words are used in

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describing the property, as are found in the conveying part of the purchase deed.

*Gye* and *Hughes* continued in possession of the property to the time of their bankruptcy.

At the time of the purchase by *Gye* and *Hughes*, there were various effects upon the premises, which, if erected by a tenant, would come under the denomination of trade fixtures, and tenant's fixtures. All these *Gye* and *Hughes* took under their purchase deed. An inventory has been made of the fixtures and effects upon the premises. They consist of stoves, grates, bells, a gasometer, retort houses, and gas fittings, steam engine and saw mill, and other things which might be removed without injuring the freehold; and which, in case of a sale to a purchaser, with an agreement to take the fixtures at a valuation, or as between an outgoing and incoming tenant, would be valued. There are some few things in the inventory, which appear by the evidence adduced not to be fixed at all, nor ever to have been fixed. Respecting these, there can be no question but that they pass to the assignees of the bankrupts. Most of the articles in the inventory are described by Mr. *Ventom*, who was examined in behalf of the assignees, as tenant's fixtures, or as trade fixtures, capable of removal without injury to the freehold. Some other things are described as being loose, but appear to have belonged to, and to have been taken from, things which were fixed. Some few things are described by Mr. *Hopkins*, who was examined for the mortgagees, as being permanently fixed to the freehold, and not capable of removal without injuring the freehold,—as the forge in the smith's shop, and the balloon hall. But, for the

purpose of deciding the present question, I think we may take the evidence of Mr. *Ventom*.

The material question between the parties is, whether those articles which Mr. *Ventom* calls tenants' fixtures and trade fixtures, and which, he says, could be removed without injury to the freehold, pass to the mortgagees under the mortgage deed, or to the assignees of the bankrupts, as part of the personal estate and effects of the bankrupts, or as being in the order and disposition of the bankrupts at the time of their bankruptcy. Now all these fixtures, except the gasometer, retort houses, gas fittings, the balloon hall, and the steam engine and saw mill, were upon the premises at the time of the mortgage, and were taken by *Gye* and *Hughes* under their purchase deed. The fixtures last mentioned have been put up by the bankrupts since the mortgage.

The money borrowed of the mortgagees was wanted for, and applied to, the purchase of the property.

The question of order and disposition does not, I think, arise in this case; because the clause 72 of 6 *Geo.* 4. c. 16., relating to order and disposition, clearly applies only to goods and chattels. No goods and chattels, *eo nomine*, are included in the mortgage deeds. The words used in the mortgage deed, in addition to those which are descriptive of the houses and land, are "the workshops, sheds, icehouses, great room, orchestra, covered walks, open walks, ways, passages, pavilions, boxes, and spring gardens, yards, and ponds, and also an aqueduct to supply the said pond from Vauxhall Creek." Some articles in some of the above workshops, sheds, great room, orchestra, &c. are claimed by the assignees; but the workshops, &c., themselves are ad-

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mitted to be part of the mortgaged estate. The articles in question therefore must either pass to the mortgagees, as part of the estate to which they are annexed,—or to the assignees, as the goods and chattels of the bankrupts. Any articles which, though loose, have been disunited without leave or the knowledge of the mortgagees, must I think follow the fixtures. They cannot be considered as in the order and disposition of the bankrupts, with the consent of the true owner. The term “fixtures,” as observed by Mr. Baron *Parke* in the case of *Hallen v. Runder* (a), to which I shall presently refer more particularly, has now acquired the peculiar meaning of personal chattels which have been annexed to the freehold, but which are removable at the will of the person who has annexed them. Most of the articles in question are things of this description, or what are ordinarily called tenant's fixtures, and could be removed without injuring the freehold. Now the general rule relating to the right to fixtures is that which prevails between the heir and executor; and, as between them, the articles in question would, I think, go to the heir. All the other cases, as to landlords and tenants, and execution creditors, are mere exceptions in favor of trade. By a conveyance therefore of a freehold house containing fixtures, as stoves, grates, kitchen ranges, closets, &c., where there is nothing to indicate a contrary intention, the fixtures will pass with the house, and be considered as part of the freehold (b). In that case Mr. Justice *Bayley* says, “in the case of an heir selling a house which descends to him, in the absence of any express stipulation, he would be taken to sell it as it came to him,

(a) 3 Tyrw. 959.

(b) *Colegrave v. Dias Santos*, 2 B. & Cr. 76.

and the fixtures would pass." It seems to me, that the same rule must prevail, in the case of a purchaser of an estate mortgaging the estate which he purchased—that, in the absence of any express stipulation, he would be taken to mortgage it as it came to him, and that the fixtures would pass. In this respect, a mortgagee must, I think, be considered as a purchaser, to the amount of his charge upon the estate.

In the present case, most of the fixtures in question came to the bankrupts under their purchase deed as part of the estate, and the very same words are used in the mortgage deed as are found in the purchase deed; but the assignees contend, that under the mortgage deed, these fixtures are not to be treated as parcel of the estate, but as the goods and chattels of the bankrupts. I cannot come to this conclusion. I am of opinion, that all the fixtures upon the premises at the time of the mortgage, and those also which have been erected since by the mortgagors, pass to the mortgagees, as parcel of the mortgaged estate. I should not have thought it necessary to do more than express my opinion upon this case, in conformity with most of the cases that have occupied the attention of the Courts upon this point, but that I find in the latest case before the Court of Review, *Ex parte King* (a), the learned judges, after time taken to consider, were divided in opinion; but, after an attentive consideration of the judgments given in that case, the opinion which I have formed upon the point submitted for my decision is not in any way shaken. I have always considered, that personal chattels fixed to the freehold become parcel of the freehold; but, if fixed by a person having a particular interest in the freehold as a termor,

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(a) 1 Mont. D. & D. 119.

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and capable of removal without injuring the freehold, the termor may disunite them. A mortgagor in possession has, in my opinion, no such interest in the premises, as will enable him to exercise this right of a tenant for years. He only holds possession of the land by the permission of the mortgagee, who may, by ejectment, without giving any notice, recover against him. In this respect, it is said, the estate of a mortgagor is inferior to that of a tenant at will. Although judges have found it difficult to describe in proper terms the relation of mortgagor in possession and mortgagee, yet I think it clear, from all the cases, that a mortgagee, who merely receives his interest from the mortgagor in possession, may at any time eject the mortgagor, and that such mortgagor can do nothing to prejudice the mortgagee, without his consent (a).

I will now refer to some of the principal authorities upon the point in dispute.

In Bacon's Abr. Executor, H. 3, the law is thus laid down:—If a man erects a furnace in the middle of a floor, though it doth not depend upon any wall, yet it goes to the heir with the land, and not to the executor as a chattel; for it is to be esteemed parcel of the house, there placed on purpose by the ancestor to descend as the law would carry it; citing 21 H. 7. 26, 27; Keilw. 88. But if a person, who hath a particular interest in the house, doth annex any thing to the same for the benefit of his own trade, he may disunite during the continuance of that interest, if it may be done without any destruction or disadvantage to the freehold; and

(a) See *Doe v. Maisey*, 8 B. & C. 767; *Pope v. Biggs*, 9 B. & C. 253; *Doe v. Cadwallader*, 2 B. & Ad. 473; *Doe v. Williams*, 5 Ad. & El. 297; and *Evans v. Elliott*, 9 Ad. & El. 342.

therefore if a dyer, being a termor for years, erects a furnace in the middle of the floor not affixed to any wall, he may take it down during his term; because such trader erects for the use of his trade, and is *owner both of the floor and the furnace*, and it may be disunited and altered without prejudice to the landlord. 20 H. 7. 13; 21 H. 7. 27; Owen, 70, 71.

In a modern case of *Lyde v. Russell* (a), the law, as thus laid down was recognized, and followed; it was there held, that the property in fixtures put up by a tenant, and which would be in the tenant if he removed them during the term, vests in the landlord, on the determination of the term, as parcel of the freehold.

In *Ryal v. Rowles* (b), in which case there were several mortgages, one was a mortgage of a house and brewhouse and *all the coppers* and utensils in trade. In speaking of this mortgage, Lord *Hardwicke* says (c), "The mortgage of *Tomkins* is of a double nature, of a lease of the house, with the fixed and moveable goods. As to the fixed, there is no title to remove them till the mortgage is satisfied; for though they might be seized, according to *Poole's* case (d), yet where a trader erects fixtures to his house, and leases it, neither he nor any other can remove them during the term, any more than he can cut down trees during the term he had leased, if they are part of the lease and not excepted thereout; those which are not fixed will be liable to the seizure in a lease of the house with the moveables; the whole rent issuing out of the house, and not out of the chattels. 5 Co. 17; Dyer, 212 b."

And, again, Lord *Hardwicke*, in his judgment in the

(a) 1 B. & Ad. 395.

(c) 1 Ves. 361.

(b) 1 Ves.

(d) 1 Salk. 368.

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same case, says (a),—"As to the mortgages of lands and fixtures, they are not affected by the act of parliament (meaning the clauses relating to reputed ownership); but what is affected by the direction therein is the assignment to *Stevens* relating to any *utensils not fixed* to the freehold."

In *Ex parte Quincy* (b), Lord *Hardwicke*, from the report of that case, appears to have said, "If a man sells a house where there is a copper, or a brewhouse where there are utensils, unless there were some consideration given for them, and a valuation set upon them, they would not pass." This point, however, was not decided by Lord *Hardwicke*; and the dictum seems to be at variance with his lordship's observations in *Ryal v. Roules*. The opinion, therefore, expressed by Lord *Hardwicke* in *Ex parte Quincy* cannot have the weight that would belong to a judicial decision of that very learned judge. The dictum too is not supported by any case at law; but on the contrary, in *Colegrave v. Dios Santos* (c), it was expressly decided, that by a conveyance of a freehold house containing fixtures, such as stoves, grates, kitchen ranges, &c., where there is nothing to indicate a contrary intention, the fixtures will pass with the house, and be considered as part of the freehold.

In the case of *Elwes v. Maw* (d), Lord *Ellenborough* says, "Questions respecting the right to what are ordinarily called fixtures principally arise between three classes of persons. First, between different descriptions of representatives of the same owner of the inheritance; namely, between his heir and executor. In this first

(a) 1 Ves. 375.

(c) 2 B. &amp; C. 76.

(b) 1 Atk. 477.

(d) 3 East, 38.



case, that is, as between the heir and executor, the rule obtains in most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel any thing which has been affixed thereto. Secondly, between the executor of tenant for life, or in tail, and the remainderman or reversioner; in which case the right to fixtures is considered more favourably for executors, than in the preceding case between heir and executor. The third case, and that in which the greatest latitude and indulgence has always been allowed in favour of the claim to have any particular articles considered as personal chattels, as against the claim in respect of freehold or inheritance, is the case between landlord and tenant."

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*Colegrave v. Dios Santos* (a) decides, that, as between the heir and executor, fixtures commonly so called, but removeable as between landlord and tenant, would be considered as parcel of the freehold, and belong to the heir. Lord *Tenterden*, in that case, says, "The rule of law is most strict between the heir and the executor. According to that rule, the articles in the two first classes mentioned by the plaintiff's counsel (the articles in one of these classes being tenant's fixtures), would be considered as parcel of the freehold." *Bayley, J.*, and *Best, J.*, express similar opinions.

In *Hubbard v. Bagshaw* (b) the Vice-Chancellor says, "The general rule is, that whatever is affixed to the freehold, whether by the tenant or not, shall remain, and not be removed by the tenant, but be part of the freehold; Co. Litt. 53 a. One exception to the rule is the case where the tenant, for the purposes of trade, does, at his own expense, erect buildings or affix ma-

(a) 2 B. & C. 76.

(b) 4 Sim. 326.

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chinery. In that case he may remove them during the term; *Lord Dudley v. Lord Ward* (a); *Penton v. Robart* (b). But in this case, it is to be observed, that the steam engine was erected before the mortgage was made; and that Messrs. *Sharp*, the mortgagors, were, in point of law, merely tenants at will to the plaintiffs, the mortgagees, part of whose fee-simple estate was the steam engine. The law, therefore, regarding the right of the tenant to remove machinery put up by him, and the evidence before the master as to the local custom authorizing tenants to remove machinery, are not applicable to the present case. In *Horn v. Baker* (c), *Horn* and *Jackson* were in possession, as tenants, of a distillery house, wherein there were stills set in brickwork, and let into the ground. *Horn* and *Jackson* became bankrupts. The stills had not been set up by them; and, in an action by the reversioner against the assignees, it was held that, because the stills were fixed to the freehold, they did not pass to the assignees, but that the vats did pass to the assignees on account of the reputed ownership. That case shows that, as between the assignees in bankruptcy of the tenant and the reversioner, the assignees could not become entitled to the steam engine; and the same point was in effect decided in *Ryall v. Rowles* (d); and the case of *Steward v. Lombe* (e) is a strong decision, though not exactly of the same point.

The case of *Horn v. Baker*, referred to and observed upon by the Vice-Chancellor in *Hubbard v. Bagshaw*, is one of the leading cases upon the point. Sir *George Rose*, in *Ex parte King* (f) before referred to, seems to

(a) Amb. 113.

(b) 2 East, 88.

(c) 9 East, 215.

(d) 1 Ver. 375.

(e) 1 Brod. & Bing. 506.

(f) 1 Mont. Dea. & D. 119.

think that the vats, which were held to pass to the assignees by virtue of the reputed ownership, were also fixtures as much annexed to the building as grates, coppers, and boilers. But, with the greatest deference to that learned judge, I cannot think, either from the statement of the facts of the case, or from the judgment, that they were in any way fixed. The statement is, that they were supported by, and rested upon, brickwork and timber, but were not fixed in the ground. The stills are stated to be *set in* brickwork, and let into the ground. It does not appear, that the vats were *set* in brick and mortar, but merely that they were supported by, and rested upon, brickwork and timber. The brickwork upon which the vats stood might have been let into the ground, but the vats themselves were not, as it appears to me, fixed to the brickwork. I consider from the statement, that the vats were supported merely by pressure on the brickwork; they rested by their own weight on the brick foundation. These vats, therefore, were no more fixtures than the wooden barn, for which trover was held to lie, in the case of *Wansbrough v. Maton* (a), which was erected by a tenant on a foundation of brick and stone, the foundation being let into the ground, but the barn resting upon it by weight alone. *Rex v. Otley* (b) was decided on the same ground, as to a mill made of wood which had a foundation of brick, but the wood work was not inserted in the brick foundation, but rested upon it by its own weight alone. *Bayley J.* says, "It is not parcel of the freehold, unless it be affixed to it, or to something previously connected with it. Here the mill was not affixed to the land, but merely rested on a foundation of brick." And

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(a) 4 Ad. & El. 884.

(b) 1 B. & Ad. 161.

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Parke J. says, "here the windmill rested merely upon the brick foundation, without being annexed to it by cement."

In *Lee v. Risdon (a)*, Lord Chief Justice *Gibbs* says : "The right between landlord and tenant does not altogether depend upon the principle, that the articles continue in the state of chattels; many of these articles, though originally goods and chattels, yet when affixed by a tenant to the freehold, cease to be goods and chattels by becoming part of the freehold; and though it is in his power to reduce them to the state of goods and chattels again, by severing them during his term, yet until they are severed, they are a part of the freehold; as wainscots screwed to the wall, trees in a nursery ground, which, when severed, are chattels, but standing, are part of the freehold, certain grates, and the like. And, unless the lessee uses during his term his continuing privilege to sever them, he cannot afterwards do it; and it never, I believe, was heard of, that trover could be afterwards brought; and what my brother *Burrough* suggests to me is very true, that felony cannot be committed of these things; for if a thief severs a copper, and instantly carries it off, it is no felony at common law (*b*): if, indeed, he lets it remain after it is severed any time, then the removal of it becomes a felony, if he comes back and takes it." Lord *Tenterden*, in giving his judgment in *Colegrave v. Dias Santos*, cites this opinion of Lord Chief Justice *Gibbs*, on the power of tenants to remove fixtures, and that trover would not lie for them. The same was also decided in *Lyde v. Russell (c)*. It was decided by *Lee v. Risdon (a)*, that the

(a) 7 Taunt. 191.

(b) By 7 & 8 Geo. 4. c. 29. s. 44., this is now declared to be a felony.

(c) 1 B. & Ad. 394. See also *Avery v. Chesslyn*, 3 Ad. & El. 75.

price of fixtures could not be recovered under a declaration for goods sold and delivered. In *Hallen v. Runder (a)*, the same point was decided in the same way; but in that case, the landlord having agreed to buy the fixtures of the tenant, it was held that the price might be recovered, as for fixtures and effects bargained and sold. And *Bayley J.* there observes upon the distinction between the owner of the inheritance, and a person of a lesser interest, being the owner of the fixtures; if the former, his lordship says: "The fixtures would be parcel of his freehold, so as not to be liable to be taken as goods and chattels under a *fi. fa.* against the tenant. Here they ceased to be the property of the reversioner, having been originally sold to the termor, with whom the defendant has bargained to take them. And Lord *Lyndhurst*, in that case *(b)*, assents to the distinction pointed out by *Bayley J.* In *Trappes v. Harter (c)*, Lord *Lyndhurst*, in his judgment upon that case, also adverts to the same ground of distinction; his lordship says: "The machinery belonged to the partnership, as they had the legal estate in it. With respect to the mortgage deed,—that was executed, not by the partners generally, but only by that portion of them who had the legal estate in the buildings and land." *Winn v. Ingilby (d)* was decided on the same ground. In *Lawton v. Salmon (e)*, Lord *Mansfield* takes the same distinction. His lordship says: "It would have been a different question, if the springs had been let, and the tenant had been at the expense of erecting these salt works; he might very well have said, 'I leave the estate no worse than I found it.' That would be for the encouragement

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REYNAL
and others.

(a) 3 Tyrwh. 960.

(c) 3 Tyrwh. 629.

(e) 1 H. Bl. 259, note.

(b) *Ibid.* 961.

(d) 5 B. & Ald. 625.

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and convenience of trade, and the benefit of the estate. Mr. *Wilbraham*, in his opinion, takes the distinction between executor and tenant. For these reasons, we are all of opinion, that the salt pans must go to the heir." In the case above mentioned, of *Hallen v. Runder* (a), Mr. Baron *Parke* says: "When chattels are fixed to the freehold by a tenant, they become part of it, subject to the tenant's right to separate them during the term, and thus convert them into goods and chattels, as stated by Lord Chief Justice *Gibbs* in *Lee v. Risdon* (b), and the very able work of *Amos* and *Ferrard*; but whilst annexed, they may be treated for some purposes as chattels; for instance, in the execution of a fi. fa., they may be seized and sold, as falling under the description of goods and chattels (c), in like manner, as growing crops of corn, or other *fructus industriales*, which go to the executor, and to which they bear a close resemblance. The case above cited, however, decides, that they cannot be treated as goods in an action for the price; and although in the subsequent case of *Pitt v. Shew* (d), they were held to fall under the description of goods, chattels, and *effects*, in an action of trespass, we cannot consider that previous authority overruled; because, in the latter case, it is probable, that the articles taken had been severed from the freehold before the sale by the defendant, though Lord Chief Justice *Abbott* certainly does not mention that circumstance as the ground of the decision. The plaintiff cannot recover the price fixed for these effects, as for goods sold and delivered." Again, in *Boydell v. M'Michael* (e), Mr. Baron *Parke* says: "I confess I have always thought it clear, since the case of *Horn v. Baker*, that fixtures were not goods

(a) 3 Tyrwh. 960. (c) *Pool's case*, 1 Salk. 368. (e) 3 Tyrwh. 980.

(b) 7 Taunt. 191. (d) 4 B. & Ald. 206.

and chattels within the meaning of the 6 *Geo.* 4. c. 16. s. 72., whether the bankrupt mortgagor had been owner of the fee, or tenant for life or years. If they were fixed to the freehold, by whomsoever fixed, I have always considered that they were parcel of it, and not within the statute at all, and uniformly acted upon that opinion. I think that a plain and convenient rule. The real nature of a tenant's interest in fixtures is this: he may, if he has purchased them, or affixed them to the freehold, remove them during his term, and that right has been held sufficient to justify seizing them under a fi. fa. issued against him, in the same way that *fructus industriales* may be seized; but they are for other purposes, and particularly within the meaning of this statute, whilst they are fixed to the freehold, not goods and chattels at all." Mr. Baron *Alderson* expressed a like opinion. And in *Coombs v. Beaumont* (a), the Court express the same opinion, recognizing the rule laid down in *Horn v. Baker*, and holding that there is no distinction in this respect between such fixtures as would be removeable between landlord and tenant, and such as would not. In addition to the above may be mentioned the cases of *Ex parte Wilson* (b), and *Ex parte Belcher* (c), and the opinion of Sir *John Cross*, in *Ex parte King* (d).

Mr. *Cullen*, the ablest text writer on the law of bankruptcy, speaking of the operation of the section in the statute as to reputed ownership, says, "personal chattels fixed to the freehold, which are looked upon as part of the real estate to which they are annexed, and pass by

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REYNAL
 and others.

(a) 5 B. & Ad. 77.

(b) 4 D. & Ch. 143; and 2 M. & A. 61.

(c) 4 D. & Ch. 703; and 2 M. & A. 160.

(d) 1 M. D. & D. 119.

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REYNAL
and others.

the same conveyance with it, are, in relation to this statute, considered upon the same footing with real estate properly so called, and exempted from its operation. But it is otherwise with respect to *moveable* goods and chattels, *which pass by delivery*, and of which when the property is transferred, the *delivery of possession* is generally the strongest and most essential evidence." It appears to me, that Mr. *Cullen* must have considered all fixtures on the same footing. A contrary doctrine would in effect prevent the mortgage not only of trade and tenant's fixtures at all, but in many cases of the premises to which such fixtures are annexed. Must a person, who is the owner of trade fixtures, which are capable of removal without waste or damage to the reversion, and which he is desirous of mortgaging with the premises to which they are annexed, in order to give a good title to the mortgagee in the fixtures, and prevent the fixtures passing to his assignees in the event of a bankruptcy under the clause as to reputed ownership, strip the house of the fixtures, and give *possession* to the mortgagee, upon the principle stated by Mr. *Cullen* as applicable to moveable goods and chattels, namely, that "possession itself in such property *imports* the ownership in it; it is the title on which the world commonly relies, and which has generally no other means of judging or ascertaining in whom the true ownership is, than by seeing who is in the visible possession?" I cannot think that the legislature ever intended such a doctrine to be applied to trade or tenant's fixtures. *Coombs v. Beaumont* (a), above cited is an authority directly against it; so also is *Clark v. Crownshaw* (b).

(a) 5 B. & Adol. 77.

(b) 3 B. & Ad. 804. In addition to the foregoing cases, see *Hitchman v. Walton*, 4 Mees. & W. 409; and *Weston v. Woodcock*, 7 Mees. & W. 14.

The following points of law appear to me to be established by the foregoing authorities.

Articles fixed to the freehold by the owner of the inheritance become parcel of his freehold, though the articles fixed be of such a nature, as, if fixed by a tenant, would be removeable by him during the term.

As between the different representatives of the owner of such inheritance, namely, the heir and executor, such fixtures go to the heir.

So such fixtures pass under a devise of the house, or under a conveyance of the house, if there be nothing to indicate a contrary intention.

The property in fixtures, which would be in the tenant if he removed them during the term, vests in the landlord on the determination of the term.

Trover will not lie to recover the value of tenant's fixtures, whilst affixed to the freehold,—nor, though severed from the freehold, unless severed during the term.

Indebitatus assumpsit for goods sold and delivered will not lie, to recover the value of tenant's fixtures. Fixtures removeable as between landlord and tenant, if the property of the owner of the inheritance, cannot be taken in execution under a *fi. fa.* against him.

Fixtures removeable, as between landlord and tenant, are not the subject of larceny at common law.

Fixtures removeable, as between landlord and tenant, are not goods and chattels, within the meaning of the 72nd section of the 6 Geo. 4. c. 16., as to reputed ownership. In *Ex parte Belcher* (a), before cited, the chief judge certainly expresses an opinion that, if a *tenant* annex fixtures, such fixtures are goods and chattels under this section; but I think the law is correctly laid down by

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REYNAL
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(a) 2 Mont. & A. 160. 4 Dea. & Ch. 703.

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Mr. *Cullen*; and this is also supported by *Ryall v. Rowles (a)*, *Coombs v. Beaumont (b)*, and *Boydell v. M^r Michael (c)*, which I have before observed upon.

Applying then these rules of law to the present case, I am of opinion, that the articles in question fixed to the freehold, though they are of such a nature that they would be held removeable as between landlord and tenant, pass to Mr. *Reynal* and others by virtue of the deed under which they have been decreed equitable mortgagees of the Vauxhall Gardens; and I think no distinction can be made between those articles which were affixed before, and those which were affixed after the mortgage. The mortgagee is entitled to the security of the property in its altered state, by the annexation of any additional fixtures.

Westminster,
January 11,
1841;
Serjeants' Inn
Hall,
April 25.

(a) 1 Ves. 348; 1 Atk. 165. (b) 5 B. & Adol. 77. (c) 3 Tyr. 974.

1. *Semble*, that the misconduct of a clerk may deprive him of his right, under the 48th section of the 6 Geo. 4. c. 16., to be paid six months salary in full.

2. Where an affidavit, in opposition to a petition claiming this right, stated that, on the clerk's accounts being taken, it would appear that by his imprudence property of his employer had been lost; this passage in the affidavit was ordered to be expunged as scandalous and impertinent, the respondents not having proposed to take the accounts and sustain the charge.

3. The payment in full directed by the 48th section is not to be made out of the first monies got in, but as soon as there is a sufficient fund for the purpose, after providing for the expenses of working the fiat.

Ex parte HAMPSON.—In the matter of JOHN BURKILL.

THIS was the petition of a clerk of the bankrupt for payment of six months salary under the 48th section (d) of 6 Geo. 4. c. 16. In December 1840 the Commis-

(d) 6 Geo. 4. c. 16. s. 48. "And be it enacted, that when any bankrupt shall have been indebted, at the time of issuing the commission against him, to any servant or clerk of such bankrupt, in respect of the wages or salary of such servant or clerk, it shall be lawful for the Commissioners, upon proof thereof, to order so much as shall be so due as aforesaid, not exceeding six months wages or salary, to be paid to such servant or clerk out of the estate of such bankrupt, and such servant or clerk shall be at liberty to prove under the commission for any sum exceeding such last mentioned amount."

sioners directed payment of the amount claimed by the petitioner in the following terms: "Whereas it appears to us, the major part of the Commissioners named in the said fiat, on the oath of *Kenric Hampson*, late clerk of the said *John Burkill*, that the said *John Burkill* was indebted to the said *Kenric Hampson* in the sum of 31*l.*, being for salary due to the said *Kenric Hampson* from the said *John Burkill* at the date and suing forth of the said fiat, we hereby order you to pay the same out of the estate of the said *John Burkill*."

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At an audit meeting held in July 1841, it appeared that the assignees had in hand 128*l.* 5*s.* 5*d.* only, which the Commissioners directed them to retain, to answer the expenses of certain actions which had been commenced for the recovery of part of the assets. Other assets had since been realized, but the whole amount in hand did not exceed 200*l.*

The assignees not having paid to the petitioner the 31*l.*, ordered to be paid by the Commissioners, he now presented his petition for payment. In opposition to it, an affidavit was filed by the assignees containing a statement to the effect, that by the petitioner's imprudence property of his employers had been lost, and that this would appear, if his accounts were strictly investigated. On account, however, of the expense of such an investigation, the assignees did not propose that it should be made. The passage in the affidavit containing the above charge was, with several other passages, on the application of the petitioner, referred, on the 15th of November 1841, to Mr. *Ayrton*, who was to inquire whether they were scandalous and impertinent. Mr. *Ayrton* found that the passage in question was impertinent but not scandalous. To this report the petitioner

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HAMPSON.

excepted, and now moved that it might be referred back to Mr. *Ayrton* to be reviewed.

Mr. *W. R. Ellis*, in support of the motion. The criterion, by which this question is to be tried, is thus laid down: what a party cannot reply to and produce evidence to, on account of its irrelevancy to the issue, is impertinent; and, if it further attack his character, it is scandalous; *Corbett v. Tottenham* (a), *Peck v. Peck* (b), *Smith v. Reynolds* (c), *Ex parte Knight* (d), *Ex parte Simpson* (e). The observations, although they might not be libellous if made in a matter not connected with the petitioner's business, are nevertheless libellous, when applied to him in his character of clerk, *Ingram v. Lawson* (f), *Brayne v. Cooper* (g). And an expression, which would amount to a libel, will be held scandalous, and will be expunged by a Court of equity in any proceeding taken in such a Court; *Erskine v. Gartshore* (h). If the petitioner omitted to controvert by evidence such a statement, his character would be destroyed; and if he incurred the expense of adducing testimony to repel the charge, and should not succeed, from any cause, upon his petition, the expense would fall upon him. His only course is therefore to have the irrelevant and scandalous matter expunged.

Mr. *Anderdon*, for the assignees. The charge cannot be scandalous, unless it is impertinent. Now it is sufficiently material, if it only affect the question of costs. But this goes further; for such misconduct as is here alleged would prevent the petitioner from recovering his

(a) 2 Molloy, 319.

(b) Mosely, 45.

(c) Mosely, 69.

(d) 3 Mont. & Ayr. 143.

(e) 15 Ves. 476.

(f) 6 Bing. N. C. 212.

(g) 5 Mee. & Wels. 249.

(h) 18 Ves. 114.

salary at law, and must therefore be a sufficient answer to his petition here. It is moreover an inconvenient practice, and one which this Court will not encourage, as leading to unnecessary expense, to refer affidavits for impertinence. Immaterial passages may either be traversed, or not noticed; and it is far more convenient and less expensive to advert to them upon the question of costs, than on a reference for impertinence.

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HAMPSON.

Mr. *W. R. Ellis*, in reply, was stopped by the Court.

Sir JOHN CROSS—The petitioner in this case is a clerk, who seeks payment of his salary for six months, under the provisions of the statute 6 *Geo. 4. c. 16. s. 48*. It appears that he has obtained from the Commissioners an order for payment, which the assignees have not complied with, but which it is the object of the present proceeding to compel them to obey. I do not think it necessary to say how far they might be able to succeed in resisting payment, by showing that the petitioner had so misconducted himself, that at law he could recover nothing for his services, I do not give it as my opinion, that misconduct might not be material, if it were intended to establish it by evidence. But the affidavit filed on the part of the respondents states, that, if the petitioner's accounts were strictly investigated, it would be found that by his imprudence property of his employer had been lost. Now, although this is stated in the affidavit, the assignees state that, on account of the expense of such a proceeding, they do not propose to take those accounts, or, consequently, to prove the charge which they have made. This being so, I see no distinction between this case and *Ex parte Simpson* (a). It appears

(a) 15 Ves. 476.

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HAMPSON.

to me, that, as the passage complained of is mere slander wholly unsupported by evidence, and as all intention of proving it to be true is abandoned, it should be struck out as scandalous.

April 25th.

The passages complained of having been removed from the affidavit filed on behalf of the respondents, the petition now came on to be heard upon the merits; when the prayer of it was resisted by the assignees, on the ground that they had commenced actions to recover part of the outstanding assets, and that, until the event of those actions was ascertained, it was uncertain whether there would be any assets for payment of the petitioner's demand.

Mr. *W. R. Ellis*, in support of the petition. The Order of the Commissioners, against which the assignees have not appealed, and which is therefore binding upon them, directs them to discharge the petitioner's demand, without fixing any time. It is therefore an order for immediate payment, and yet upwards of a year has elapsed without its being obeyed. [Sir *John Cross*. The Commissioners cannot give the petitioner any greater privilege, than is afforded him by the legislature.] The object of the 48th section proves that the immediate payment was intended by that provision; for the reason of the introduction of the clause was undoubtedly to provide for the immediate subsistence of servants, who would be suddenly thrown out of employment by the bankruptcy of their masters. Besides, it is unreasonable to demand that the petitioner's right should depend upon the issue of proceedings, in which he is in nowise interested. He is at all events to be paid in full; and what remains after paying him is, after deducting from it

the necessary expenses incurred in getting it in, to be divided among the other creditors. It would be in substance repealing the section, to hold that the servant's money, to which that provision entitles him, may be risked for the chance of obtaining something for the other creditors. Nothing can be more unjust than that the whole peril should be his, while all that may be gained is to belong to others.

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HAMPTON.

Mr. *Anderdon*, for the assignees. The Order of the Commissioners cannot have been intended to direct immediate payment; for it is dated on the day of the choice of assignees, and, consequently, before any assets had been got in. It appears further, that afterwards at an audit meeting the Commissioners directed the assignees to retain in hand the small sum of 128*l.* 5*s* 5*d.*, which had been then realized. The Order of the Commissioners for payment therefore does not conclude the case; and with regard to the statute, if the legislature had intended the payment directed by the 48th section to be made out of the first monies received by the assignees, it would have said so, as it has done in the 14th section, which provides for payment of the petitioning creditor's costs.

Mr. *W. R. Ellis* in reply.

Sir JOHN CROSS.—By the general bankrupt law creditors were entitled to come in for a distribution of the assets, *pari passu*. But by the last act, 6 *Geo.* 4. c. 16. s. 48., this exception was introduced, that clerks and servants should receive six months wages or salary in full. The act of parliament, however, says nothing as to the time when, or the circumstances under which, the payment

1842.

Ex parte
HAMPSON.

shall be made ; but confines itself to the provision, that whereas other creditors are to be paid only a dividend, these particular creditors shall have payment in full. As the provision is an exception to the general rule, I do not think its scope should be extended by giving a liberal construction to it, but that it should, on the contrary, be construed strictly. In this case the Commissioners have ordered the assignees to pay the petitioner in full ; but the Order says nothing, nor does the statute say anything, as to the time of payment. The 14th section of the act, which provides for the payment of the costs of the petitioning creditor, directs him to be reimbursed out of the *first* money that should be got in under the commission ; but the 48th section contains no such provision with respect to the salary of clerks. It appears, therefore, that the legislature looked, and that this Court must look, in the first instance, to the payment of the expenses of working the fiat. The assignees are, it seems, engaged in bringing actions at law, of which the result is uncertain. These are, I think, proceedings taken in the prosecution of the fiat ; and so long as it is uncertain whether there will be any balance in the hands of the assignees, after paying the expenses of such proceedings, I do not think a clerk has a legal right to demand payment. I do not go to the extent of saying he must wait for payment until a dividend is declared ; but only so far as to say, that he must wait till there is a sufficient sum for payment of his demand, after the expenses of working the fiat have been provided for.

It was arranged, by consent, that the petition should stand over, till the assignees had funds in hand to meet the claim.

1842.

Ex parte STALLARD and others.—In the matter of
FREELAND.

Westminster,
January 12.

THIS was the petition of certain creditors, praying that the appointment of assignees might be set aside, on the ground that some of the petitioners had been improperly excluded from voting; also praying that other persons, for whom the petitioners and others of the creditors had tendered their votes, forming together a majority in number and value, might be declared assignees.

The ground of the rejection of the votes was, that the creditors who tendered them had an adverse interest to the general body of creditors; one of the votes being that of a creditor who had seized property of the bankrupt to the amount of 900*l.* under an execution, which it was intended to impugn on the part of other creditors; and the other vote being that of a firm, in which the execution creditor was a partner.

Where the Commissioners at the election of assignees rejected votes which would have turned the choice, on the ground that the creditors tendering them had an adverse interest to the general body of creditors, the Court set aside the choice which had been ratified by the Commissioners, and, without directing a new one, declared the assignees elected by the majority duly chosen.

Mr. *Anderdon*, and Mr. *Cameron*, in support of the petition.

Mr. *Rolt*, for the respondents. If the creditors had voted, they would have carried the choice; and the persons for whom they desired to vote were friends of theirs, who were wholly under their control, and, consequently, would not have taken effectual proceedings to set aside the execution. Such a choice would amount substantially to annulling the fiat; as, unless the execution is set aside, there will be no estate to administer. It is clear, that the Commissioners might have rejected the assignees,

1842.

Ex parte
STALLARD
and others.


when chosen (a); what then could be the use of going through the idle form of electing them? At all events, the Court cannot do more than direct a new choice.

Mr. *Anderdon* was not called upon to reply.

Sir JOHN CROSS.—It is not alleged, that the persons elected by the majority of the creditors have any personal interest adverse to the general interests of the creditors, but only that they are friends of parties who are in that situation. Under these circumstances, taking it to be clear that the Commissioners have acted under an erroneous impression as to their authority, in supposing that they could reject the vote of a creditor, on the ground of his having an adverse interest, I think I am bound to declare that the gentlemen elected by the majority were duly chosen, and now are assignees of the bankrupt's estate and effects.

Declared accordingly. Costs out of estate.

(a) 6 Geo. 4. c. 16. s. 61. "At the second meeting appointed by the Commissioners as aforesaid, or any adjournment thereof, assignees of the bankrupt's estate and effects shall be chosen, and all creditors who have proved debts under the commission to the amount of 10*l.* and upwards shall be entitled to vote in such choice." "Provided that the Commissioners shall have power to reject any person so chosen, who shall appear to them unfit to be such assignee as aforesaid, and upon such rejection a new choice of another assignee or assignees shall be made as aforesaid."



1842.

Ex parte CHARLES JUNGMICHEL, THOMAS LEATHES
STRANGER LEATHES, and CHARLES JACOMB.—In the
matter of THOMAS CARTER.

THIS was the petition of the assignees under a second bankruptcy, under which fifteen shillings in the pound had not been paid, praying for the delivery up of property of the bankrupt in the possession of the official assignee under a third bankruptcy. The first bankruptcy took place in 1829, when a commission was issued, under which the bankrupt obtained his certificate. In 1834 the second bankruptcy took place, a fiat having issued on the 30th of October in that year, under which Mr. *George Green* was appointed the official assignee, and the petitioners were chosen the creditors' assignees. Various dividends had been declared under this fiat, but not amounting in the whole to fifteen shillings in the pound.

On the 14th July 1835, the bankrupt, having obtained his certificate under the second bankruptcy, commenced business as a Blackwell Hall factor at No. 6, Aldermanbury, where his name was conspicuously placed on an outer door. He continued to carry on the business up to the year 1836, when he executed a trust deed, which was advertised in the London Gazette, and whereby he assigned all his effects to the value of about 3000*l.*, for the benefit of his creditors. Up to the time of the execution of this deed, the bankrupt, according to his own affidavit, had at all times exposed in his warehouse stock in trade of the value of from 1000*l.* to 3000*l.*, which might have been seen by any one entering there. Immediately after the execution of the trust deed, the bankrupt again set up

Westminster,
Jan. 15 and 18.

A bankrupt, having obtained his certificate under a second bankruptcy, but not having paid fifteen shillings in the pound, sets up in trade as a tailor and draper, and sends circulars soliciting custom to several of the creditors who have proved under the second bankruptcy, and among others, to one of the creditors' assignees. He continues to trade for five years, without molestation on the part of the creditors, having his name conspicuously written on the trade premises, and having exposed to view there, stock in trade of considerable value; and then becomes bankrupt a third time. Held, that the assignee under the last bankruptcy could not be called upon to deliver up the assets collected by him to the assignees under the second fiat.

1842.

Ex parte
JUNGMICHEL
and others.

in business as a tailor and draper in Cheapside, and his name was conspicuously placed on a brass plate at the street door of the premises, as well as on an inner door, and on two wire blinds at the first floor window. While the bankrupt was carrying on this business, his stock in trade, which was exposed to view in his shop, was often of the value of 800*l.*, and the returns of the business amounted to about 1500*l.* During the whole of this time, the residence of the bankrupt was in Aldermanbury, nearly opposite the office of the official assignee under the second fiat, who was aware of the bankrupt's carrying on business both in Aldermanbury and in Cheapside; the bankrupt having, on commencing his business at the latter place, called on the official assignee and informed him of the circumstance, requesting at the same time to be favoured with his custom. He made a similar application to the solicitor under the second bankruptcy, who promised to recommend him. The bankrupt had also, on commencing business as tailor and draper, written circulars to nearly all the creditors who had proved under the second bankruptcy, soliciting their custom, and among others to *Charles Jacomb*, one of the assignees, whose son deposed to the fact of the circular having been received, and of his father being aware of the bankrupt's carrying on the business of tailor and draper. It was also sworn by the bankrupt, that several of his creditors, who had proved under the second bankruptcy, had dealt with him subsequently to his obtaining his last certificate, and that several of the creditors had been in the habit of going to the premises in which the bankrupt had carried on business, both in Aldermanbury and Cheapside, and had seen the stock in trade there exposed to view.

On the 21st of February 1840 another fiat was issued against the bankrupt, under which Mr. *George Green*, the official assignee under the former fiat, was appointed official assignee; but no appointment of creditors' assignees had taken place. Under this fiat, assets to the amount of 199*l.* 2*s.* 5*d.* had been got in, and a dividend meeting had been advertized for December 17th 1841.

The petitioners prayed for a declaration that they were entitled to the future estate and effects of the bankrupt, until they were paid fifteen shillings in the pound; and for an Order in the meantime, restraining the official assignee from parting with the amount realized, or to be realized, under the third bankruptcy, and directing him to pay over the fund in hand to the petitioners.

Mr. *Bacon*, and Mr. *Rogers*, for the petitioners, relied upon 6 *Geo.* 4. c. 16. s. 127 (a).

Mr. *J. Russell*, and Mr. *Petersdorff*, for the assignees. It is clear, that the assignees under the second bankruptcy knew of the bankrupt's carrying on business, subsequently to the allowance of his certificate under that

(a) 6 *Geo.* 4. c. 16. s. 127. "And be it enacted, that if any person, who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any insolvent act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce, after all charges, sufficient to pay every creditor under the commission fifteen shillings in the pound, such certificate shall only protect his person from arrest and imprisonment; but his future estate and effects (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife, and children,) shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner, as they might have seized property of which such bankrupt was possessed at the issuing the commission."

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fiat. [Sir *John Cross*. That is not enough. It must appear that they knew of his having the property claimed. It is not sufficient to show that he was a working trader.] The affidavits show, that his possession of property was a matter of notoriety. The case of *Butler v. Hobson* (a) is decisive in favour of the respondents. There, Lord C. J. *Tindal* said, "If that clause (section 127) had stood alone, it might have been contended with some show of reason, that the assignees under a second commission, under which fifteen shillings in the pound had not been paid, might, notwithstanding the bankrupt had been trading for a long series of years, lawfully seize property in his possession, to satisfy the balance due to the creditors under such second commission. That, however, is not the only section that has a bearing on the subject." And, after referring to the terms of the 72nd section, his lordship continued, "One point for our determination is, whether, or not, the clause last mentioned applies to this case. It appears that, from the time of his obtaining his certificate under the second commission, down to the issuing of the fiat on the 8th of November 1836, the bankrupt had, with the knowledge and consent of the assignees under that second commission, carried on trade to a considerable extent. The assignees under that commission, of whom the plaintiff is the survivor, might during that time, had they been so minded, have seized the bankrupt's property to satisfy the old creditors. They, however, voluntarily refrained from so doing; the property therefore remained, down to the day of the issuing the fiat in 1836, in the order and disposition of the bankrupt, with the consent of the plaintiff and his co-assignee. The question which arises in this state of

(a) 5 Scott, 798; 4 Bing. N. C. 490.

facts is, whether there is any thing in the character of an assignee to differ the case from that of any other true owner. Neither upon principle, nor upon authority, do I think an assignee of a bankrupt stands in a different situation from any other trustee. If a trustee, who being clothed with the legal property in goods, permits them to remain in the order and disposition of a trader, forfeits his right to reclaim them in the event of the trader becoming bankrupt,—why should one, who stands in the situation of a trustee for the general body of creditors, be held to be exempt from the same consequences? The evil in either case is precisely the same; the trader, by being suffered to retain the apparent ownership of property to which he is not legally entitled, enjoys a false credit, which he otherwise would not possess. No authority has been cited, to show that a distinction has ever been recognized between the case of a trustee and that of any other individual; and I am not disposed to broach such a doctrine. It would be dangerous, indeed, were it in the power of assignees under the second commission where fifteen shillings in the pound had not been paid, to allow the bankrupt to carry on trade, and appear solvent to the rest of the world, so long as they might think proper, and the moment he had got into his hands property enough to satisfy the outstanding claim of his old creditors, to seize the whole for their benefit, leaving the new creditors destitute of remedy." And it was upon these grounds, that the plaintiff, who was assignee under the second commission, was held by the whole Court not entitled to recover against the assignee under the third commission. [Sir John Cross. In that case, it was taken for granted that the bankrupt had property to a large amount, with the knowledge and consent of the

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assignees. The real question seems to be, whether the bankrupt had in his possession property, of which the assignees knew themselves to be the true owners, and which they, nevertheless, permitted him to retain.] It has never been laid down, that the bankrupt's possession of the identical property must be proved to have been known to the assignees. It is sufficient, if they are shown to have been aware of his carrying on business requiring and implying the possession of capital. Nothing could be more unjust, than for the assignees, after standing by and permitting the bankrupt to trade for years, at last to be permitted to seize upon any property which he may happen to have, on the ground that the specific articles were not known by them to be in the bankrupt's possession. A general knowledge must be sufficient; to require an acquaintance with every item would lead to absurd results. The assignees might have acquainted themselves in this case with the particular articles, if they had thought proper. It was their duty to ascertain what the property was, and to take possession of it, or else to abide the consequences of allowing their chattels to be in the reputed ownership of another. [Sir John Cross. How do you prove the consent of the true owner, in a case where he is unaware of the existence of the property?] We submit, that a general knowledge, on the part of the former assignees, of the bankrupt's being in the possession of property belonging to them is sufficient, and that a distinct cognizance of every specific article is not necessary. [Sir John Cross. Your argument would prove that, if the assignees knew of the bankrupt's possessing particular property, they could never recover any other from him, although the circumstances affecting the two might render the expediency or the

fairness of attempting to get them in, very different. Suppose they permitted him to have stock in trade, without molestation; and, afterwards, he had a large legacy left him; would they be precluded from recovering that?] It is not necessary to carry the reasoning to that extent. But, independently of the argument derived from the 72nd section, the case of the creditors claiming under the third fiat is supported by clear and undisputed principles of equity. It is well established, that a Court of Equity will not lend its aid to parties who have lain by and forborne to assert their claims, allowing others to advance money, which never would have been advanced, if the former claims had been brought forward. They also cited in the course of their argument *Lingard v. Mes-sitor (a)* and *Muller v. Moss (b)*.

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Mr. Bacon, in reply. In *Butler v. Hobson (c)*, it appeared that the bankrupt had, with the knowledge of the plaintiff, carried on an extensive business at Manchester, the returns of which amounted to 30,000*l.*; and that he had property, which the plaintiff was aware of, and might at any time have seized, more than enough to pay the creditors under the second commission fifteen shillings in the pound. Under these circumstances, the jury found that the bankrupt was in possession of the goods, with the knowledge of the assignee under the second bankruptcy; but no such state of facts is established in the present case, to which therefore the authority of *Butler v. Hobson (c)* is by no means applicable. Then, with regard to the equity of the case, independently of the 72nd section,—the question here is, whether

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(a) 1 B. & C. 308.

(c) 5 Scott, 798; 4 Bing. N. C. 490.

(b) 1 Mau. & Sel. 335.

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knowledge by one out of three assignees of the fact of subsequent trading by the bankrupt, which subsequent trading the assignees have no means of preventing, is sufficient to deprive the whole body of creditors, who have proved under the second fiat, of the property to which the positive enactment of the 127th section entitles them; the act itself making no such exception from the scope of its provision.

Sir JOHN CROSS.—In this case the petitioners are the assignees under a second bankruptcy, and claim the future effects of the bankrupt, in preference to the assignees under a third bankruptcy. The former of these bankruptcies occurred in the year 1830; and in the following year the bankrupt obtained his certificate; but his estate has not produced 15s. in the pound in payment of the debts proved. After obtaining his certificate, the bankrupt set up a new trade, and continued to carry it on for a period of five years, with the knowledge of the petitioners, and without any interference on their part. The new fiat has been prosecuted for six months, with the full knowledge of the petitioners; and, until the new assignees were about to make a dividend, the petitioners not only forbore to interfere with the bankrupt while carrying on his trade, but also to advance any claim to the effects recovered under the last fiat; and then for the first time set up a latent claim to the property so recovered by the new assignees, at the expense of above 100*l.*, now due and owing to their solicitors. The case has been argued, as a mere question of law. On the one hand, it is contended, that the legal title to the property is in the former assignees, by virtue of the 127th section of the general act; and, on the other hand, that it is in the

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new assignees, by virtue of the 72d section. But I have not been able to come to any satisfactory conclusion between the conflicting rights of property created by these two clauses, which are here brought into collision; notwithstanding the case in the Common Pleas, which has been so much relied on in argument; as I cannot clearly discern from the reports of that case the precise ground on which it was decided. To determine the legal title, I can look only to the circumstances that preceded the last bankruptcy, and must disregard all that has happened since. But the justice of the case appears to me mainly to depend upon the conduct of the parties since the issuing of the last fiat. Each of the contending parties had then a qualified right in the property in dispute; and the real question is, which of the two parties is entitled to priority. Now this is a question rather of equity, than of law; and I find that it was so considered in a like case by Lord *Camden*; I mean the case of *Troughton v. Gitley* (a), where the question was, whether, under the circumstances, the creditors under a commission had lost their priority to the administrators of the deceased bankrupt. Lord *Camden* there said, "this is the case of a man, who has demeaned himself to the satisfaction of his creditors, and, under such behaviour, was suffered to trade for four years without interruption or claim. I believe it was the intention of the creditors, that he should trade for his own benefit." "The assignees meant he should be a restored person. They knew he was to go on in his trade." "It falls within the principle, that if a man, having a lien, stands by and lets another make a new security, he should be postponed—the common case of a first

(a) Amb. 630.

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mortgagee suffering a second mortgage, without giving notice of his security. Therefore, I think the creditors under the commission should lose their priority." It appears, indeed, that Lord *Eldon*, in *Martin's case* (a), did not quite approve of that decision, and said, the case of *Troughton v. Gitley* had never been considered as very high authority; but it is clear, that Lord *Eldon* did not mean to intimate that it was not a question of equity,—but a doubt, whether, under the circumstances of the case, the priority had been adjudged to the right party; for, in a subsequent case, *Ex parte Bourne* (b), Lord *Eldon* said, "if you look at the arrangement which this Court makes in almost every case as to a commission of bankruptcy, you can never say that the commission is so much a matter of right, that this Court is not equitably to interfere, wherever the interests of the parties affected by the commission require such interference. Take the instance of a commission taken out in 1820, and another taken out against the same person four or five years after, upon a subsequent trading; according to the strict law, the creditors taking out the commission in 1820 would have a right to all the subsequently acquired property, until he should have obtained his certificate under the first commission. But, if he has been permitted to go into the world as a trader, and to gain credit as such,—whatever a Court of law might say about the rights of the creditors under the first commission, this Court has said it would support the second commission, to this extent,—that it would not permit the creditors under the first commission to take that which they could not take, without injustice to the creditors under the second, whom they have permitted

(a) 15 Ves. 114.

(b) 2 Gl. & Ja. 137.

to deal with the bankrupt, as if he had his certificate." Under the authority of these cases, without deciding which party was legally entitled to the property at the time of issuing the third fiat, I am of opinion, that the creditors, for whose benefit it was sued out and prosecuted, are entitled to retain the property, which they have been permitted to acquire by the acquiescence and consent of the petitioners; and that this petition must be dismissed, with costs.

Ordered accordingly.

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Ex parte TURNER and another.—In the matter of
THOMAS TURNER.—

THIS was a petition of the creditors' assignees, praying that *James Clark*, late an official assignee (a), who was removed by an Order of this Court dated the 20th April 1841, should pay over forthwith a sum of 200*l.* received by him under this bankruptcy, together with the further sum of 40*l.* for interest on the same at the rate of 20*l.* per cent., by virtue of the provisions contained in the 1 & 2 *Will.* 4. c. 56. s. 22., and 6 *Geo.* 4. c. 16. s. 104. By the first mentioned statute, which authorised the appointment of official assignees, it is enacted by section 22, that all monies belonging to a bankrupt's estate, which are received by an official assignee, shall be forthwith paid by him into the Bank of England; and that if he shall neglect to make such payment, he shall be liable to be charged in the same manner, as by the 6 *Geo.* 4. c. 16. s. 104. is provided in cases of neglect by assignees

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Where an official assignee, who had been removed from that office, neglected to pay over a sum of money which he had received under the fiat, he was ordered forthwith to pay the same, together with interest at the rate of 20*l.* per cent. for the time of his retention of the money.

(a) See another petition against the same official assignee, *Ex parte Graham*, ante, p. 290.

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to invest money in the purchase of exchequer bills, when directed so to do,—that is, that he shall be liable to be charged by the Commissioners in his accounts, with such sum as shall be equal to interest at the rate of 20*l.* per cent. on all such money, for the time during which he shall have retained or employed the same, or during which he shall have neglected to invest the same in the purchase of exchequer bills.

Mr. *Terrell*, in addition to the above statutes, referred to Lord *Cottenham's* general order, dated the 1st September 1836, (*a*) whereby it was ordered that each official assignee should pay into the Bank of England, to the credit of the accountant in bankruptcy, all such sums of money as shall come to his hands, as soon as they shall amount to 100*l.*

Mr. *J. Russell*, for the official assignee. This petition is an additional pressure (*b*) upon the unfortunate respondent, who believes that, when the accounts in the bankruptcy are properly taken, there will be found due to him a sum of 210*l.*, or upwards. Although he feels the petition to be unnecessary, he would not have appeared here to oppose it, had not the penal infliction of heavy interest been attempted to be enforced. This charge, however, of 20*l.* per cent. is directed by the act of parliament to be made by the Commissioners, when the assignee's accounts are audited; and therefore it is not a question for this Court. There is no case in which either the Lord Chancellor, or this Court, has ever exercised the power. It is submitted, therefore, that

(*a*) See 1 Deac. Rep. 693.

(*b*) See *Ex parte Graham*, ante, page 290.

the petition must be dismissed, as relates to the question of interest; and that the Court will refer it to the Commissioner to arrange and audit the accounts.

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Mr. *Terrell*, in reply. The Commissioner feels some difficulty in proceeding in the matter, the respondent being no longer an official assignee; and the present application is made with the full cognizance and approbation of the Commissioner. With respect to the novelty of the application, there have been certainly few occasions when such proceedings have been necessary; but the present case is likely to be followed by various others, which await the result of this petition. Moreover, the official assignees give security to the Lord Chancellor for duly accounting for all monies received by them; and the security in this instance will be useless, unless we prove the assignee in default.

Sir JOHN CROSS.—This is a petition praying, that Mr. *Clark*, who was lately one of the official assignees of this Court, may pay over the sum of 200*l.* belonging to the bankrupt's estate. The receipt of this money is admitted by Mr. *Clark*, as also that he is bound to pay the same, according to the directions of the act of parliament. The petitioner likewise claims the increased interest of 20*l.* per cent., which has accrued from Mr. *Clark's* default. The Court has been addressed by his counsel in terms to excite its compassion, and deprecating an Order that would charge him to the extent of his legal obligation; as if, because a man was a public defaulter, he must be an object of public commiseration. But the Court has no power to take such matters into account; nor would it be proper to do so, if it had the

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power; for, in that case, the same plea would be invariably urged. It is then contended, that this Court has no jurisdiction to order the payment of 20*l.* per cent., but that the Commissioner alone has authority to impose this charge. The statute, certainly, declares that the Commissioner may charge the official assignee with this increased interest; but that does not take away the jurisdiction of this Court to order the payment of such interest by a defaulting assignee. I am of opinion, that there is nothing in this objection, and that it is competent for this Court to direct such payment. I am quite aware, that there have not been many applications of this nature, nor perhaps one where the Court has ordered the actual payment; but, when the Court is called upon to fulfill the positive directions of a very salutary provision in an act of parliament, it must do its duty; and it will be well, that the official assignees should, in future, know the liability they incur for disregarding the express directions of the statute, under which they derive their authority. The Order will be, that Mr. *Clark* do forthwith pay over the 200*l.*, with 20*l.* per cent. interest thereon for one year, during which he has wrongfully retained the money; and he must, as a matter of course, pay all costs on this petition. The payment must be made within fifteen days; and, in the event of his making default, the petitioner may consider what proceedings can be taken to compel such payment under the 1 & 2 *Vict.* c. 110.

ORDER as prayed.

Ex parte JAMES HOLFORD and another.—In the matter of HURST and SMITH.—

1842.



Westminster,
January 21.

THIS was a petition for the appointment of an inspector, to protect the interests of the separate creditors of *Smith*. The bankrupts had carried on trade in partnership at Hamburgh, while *Smith* carried on a separate trade at London, and in the course of such separate dealing became indebted to the petitioners in the sum of 4000*l.*, which amount they had proved against his separate estate.

Where an inspector is appointed to protect the interests of the separate creditors, the costs of and incidental to the application are directed to be paid out of the separate estate.

Mr. *Bacon* appeared in support of the petition.

Mr. *Rogers*, for the assignees, contended that, as there was no imputation against them, there was no case made out for the appointment of an inspector.

Sir JOHN CROSS.—There is a peculiarity in this case. The joint trade was carried on in a foreign country, and the separate trade here; and it appears that the assignees were appointed chiefly by the joint creditors in the foreign country. I think it reasonable, therefore, that an inspector should be appointed to watch over the interests of the separate creditors.

Mr. *Bacon* suggested, that, under these circumstances, the costs of the application should come out of the joint estate.

Sir JOHN CROSS, after referring to some other Orders on the same subject in the registrar's book, said, that the usual Order was, that the costs of, and incidental to, the application should come out of the separate estate.

1842.

Westminster,
January 21.

A mortgagee, by demise, enters up judgment against the mortgagor on another debt, and dies. His executors take, from the mortgagor, a memorandum, empowering them to hold the title deeds of the mortgaged property as a security for a part of the judgment debt in addition to the original mortgage debt. Held, on the mortgagor becoming bankrupt, that the executors might, as against a second mortgagee, tack the whole of the judgment debt to the mortgage.

Ex parte Cox and another.—In the matter of
SQUIBB.—

THIS was the petition of the executors of a testator, to whom the bankrupt had mortgaged freehold property, by demise, to secure 300*l*. Some time after the execution of the mortgage, the bankrupt gave the testator a warrant of attorney, on which judgment was afterwards entered up, to secure a further debt of 1000*l*. After the death of the testator, the bankrupt signed a memorandum, whereby he agreed, in consideration of the executors not pressing him for payment of the sums due from him to the testator's estate, that the title deeds of the mortgaged property should be held as a security for a sum of 300*l*., in addition to the former sum of 300*l*. This additional sum of 300*l*., according to the statements of the petition, formed part of the debt of 1000*l*. Subsequently, the bankrupt deposited with the petitioners certain shares in a joint stock company, as a collateral security for the sums due from him to the testator's estate. The present application was for the usual Order of sale, and for leave to tack the whole of the judgment debt to the mortgage.

Mr. Keene, in support of the petition, cited *Baker v. Harris* (a), and drew a distinction between the present case and *Ex parte Pettit* (b).

Mr. Simmons appeared for a second mortgagee.

Sir JOHN CROSS entertained some doubts, at first, on the point; but, on a subsequent day, his Honor said, that, on the authority of *Baker v. Harris*, he thought that the petitioners were entitled to tack the judgment.

(a) 16 Ves. 397.

(b) 2 G. & J. 47.

Ex parte HEDDERLY.—In the matter of *HICKLIN.*—

1842.

Westminster,
January 22.

THIS was the petition of the public officer of a banking company, for liberty to prove, without giving up a mortgage security. By a post-nuptial settlement, certain property, of which, at the time of the bankrupt's marriage, his wife was tenant in tail, was limited to such uses as the bankrupt and his wife should jointly appoint; and, subject thereto, to the use of the wife for life, for her separate use, with remainder to the use of the bankrupt for life, and remainders over in favour of the children of the marriage. The mortgage security in question was a deed, whereby, in execution of the joint power contained in the settlement, the property was appointed to the use of trustees in fee, upon trust, if the bankrupt paid to the company the balances, for the time being, owing from him upon his account current, according to the terms of a covenant in the deed, to reconvey the property to the uses of the settlement; but, in default of such payment, "upon trust," and the trustees were thereby "empowered and authorized" to sell; and, after retaining the amount secured by the deed, to pay the surplus of the proceeds of the sale to the bankrupt, and to reconvey any unsold portions of the property to the uses of the settlement.

Where the bankrupt and his wife executed a power of appointment of the wife's estate to a creditor, as a security for a debt due from the bankrupt: *Held*, that the creditor might prove for the whole debt, without giving up the security; it being incumbent on him to recover what he could from the bankrupt's estate, before he resorted to the property of the wife.

On the 31st March 1841 the fiat issued, when a balance of 2482*l.* was due from the bankrupt to the petitioner.

Mr. Coleridge, for the petition. In *Ex parte Davenport* (a), Sir George Rose said, that "with respect to the question as to the right of proving for the whole debt, without first realizing the security, it seems to me, that there is no essential difference in such right of proof,

(a) 1 Mont. Deac. & D. 323.

1842.

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HEDDERLY.

whether the security is given by a stranger, or by one of the bankrupts; and that the obligation of the creditor to realize his security is not stronger in the one case, than the other." Now, in the present case, the bankrupt had no present interest in the estate, which was the subject of the security; his wife was entitled to it for her life; and therefore the property secured may be considered as that of a stranger. In *Ex parte Groom* (a), Sir George Rose said, that it has become almost a maxim in bankruptcy, that a security is never to go in reduction of a proof, unless the property of the estate against which the proof is tendered.

Mr. Keene, *contra*. The question for the Court to determine is, whether, by the exercise of the joint power of appointment by the bankrupt and his wife, this property does not belong to the bankrupt's estate. The exercise of the power of appointment in that form gave an immediate interest to the bankrupt; for the authority given to the trustees to sell, in case of any default of payment by the bankrupt, gave the trustees a complete dominion over the property when the mortgage became forfeited. If the sale had taken place, the bankrupt would have been absolutely entitled to the surplus of the proceeds of the sale. The contract here was between the bankrupt and the mortgagee; and therefore the mortgagee has no right to prove for the balance owing to him, without first giving up his security. Besides, it is not a mere power to sell, which is given by the deed; but a trust to sell. The trustees, therefore, are bound to execute the trust. The default in payment was made before the bankruptcy; consequently, the trusts became opera-

(a) 3 Mont. & A. 164; 2 Deac. 265.

tive. If the wife has any interest in the question, she must assert it in a different form. The effect of her exercising the power of appointment was, to divest her of all interest in the property. Besides, at all events, the bankrupt had a reversionary interest in the property, which, of course, passed to the assignees under the bankruptcy subject to the mortgage. What is to become of that? If the security is not realized, it must be given up to the person from whom it was taken. And he cited *Maundrell v. Maundrell (a)*.

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Mr. Coleridge, in reply. The limitation in the deed, as to the surplus of the proceeds of the sale being paid to the bankrupt, does not affect the question. [Sir John Cross. The only doubt may be, as to the bankrupt's contingent interest in the property.] The petitioner has no objection to agree to any just apportionment.

Sir JOHN CROSS.—If the proof be admitted, and twenty shillings in the pound be paid to the petitioner, the wife will in that case be restored to her original rights. I think she is entitled to have her interests considered, and that the petitioner ought to endeavour to recover what he can from the bankrupt's estate, before he resorts to the security he holds on the property of the wife.

The ORDER was, that the petitioner should be permitted to prove for his whole debt, without giving up his security; but the Order was not to extend to authorize a sale of the property. And the parties were to be at liberty to apply.

(a) 7 Ves. 567; 10 Ves. 246.

1842.



Westminster,
January 24.

A petition complaining of the rejection of a proof neither sets forth the grounds of the rejection, nor states that none were assigned. Held, the petition might nevertheless be heard.

Ex parte MUDIE.—In the matter of WILLIAM JAMES.

THIS was a petition complaining of the rejection of a proof.

Mr. Glasse, in support of the petition.

Mr. Greene objected to the petition being heard, as it neither stated why the Commissioners had declined to receive the proof, nor alleged that they had rejected it, without assigning any reason, and he cited *Ex parte Worth(a)*, and *Montagu and Ayrton's Bankrupt Law*, vol. 1, p. 412.

Sir JOHN CROSS.—I cannot assume, in the absence of evidence, that the Commissioners did assign a reason on rejecting the proof; and therefore I cannot, on this preliminary objection, which is in the nature of a demurrer, refuse to hear the petition.

The petition was then heard, and dismissed on the merits.

(a) 2 D. & C. 4.



Ex parte WASHBROOK.—In the matter of BROWN.

Westminster,
January 24.

The Court will hear the petition of a marksman, although the attestation of it is defective in not stating that the petition has been read to him; if the petitioner's affidavit, being an echo of the petition, is expressed, in the *jurat*, to have been read to him.

MR. COLERIDGE, for the respondents, took a preliminary objection to this petition being heard, on account of the insufficiency of the attestation to the petitioner's signature. The petitioner was a marksman, and the attestation did not state that the petition had been read over to him.

The petitioner's affidavit, being an echo of the petition, is expressed, in the *jurat*, to have been read to him.

Mr. *Bacon*, in support of the petition, referred to the affidavit of the petitioner, which was an echo of the petition, and was expressed in the *jurat* to have been read over to the petitioner.

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WASHBROOK.

The COURT held this sufficient, and heard the petition, but dismissed it, with costs, upon the merits.

Ex parte JOHN WRIGHT, THOMAS WRIGHT, PASQUALE FABRI, and FERDINAND CATALACCI.—In the matter of ANTHONY GEORGE WRIGHT BIDDULPH, JOHN WRIGHT, WILLIAM ROBINSON, and EDMUND WILLIAM JERNINGHAM.

THE bankrupts, *A. G. W. Biddulph* and *John Wright*, were the residuary legatees and executors, and the bankrupt *John Wright* was the sole acting executor, of a testator named *John Biddulph*, who, by his will, bequeathed annuities to the petitioners *Thomas Wright*, *P. Fabri*, and *F. Catalacci*. *John Wright*, as the testator's executor, had possessed himself of the testator's personal estate. Certain articles, forming part of that estate, and consisting of furniture, plate, &c., came into the possession of the bankrupts, with the privity of the executor, and remained, *in specie*, in their possession at the date of the fiat.

These articles having been sold for 2046*l.*, that sum was claimed by the assignees, as arising from property in the order and disposition of the bankrupts at the date of the fiat; while, on the other hand, the petitioners insisted that they were entitled to have the whole of it applied to the purposes of the will. The ques-

Westminster,
January 24.
Part of the effects which came into the hands of an executor's assignees, on his bankruptcy, consisted of specific assets of the testator. A suit in chancery being instituted for the administration of the testator's estate, the proceeds of these assets were ordered by the Court of Review to be retained and invested, although no accounts had been taken; the suit in chancery not having proceeded to a decree.

1842.

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Ex parte  
WRIGHT  
and others.

tion was raised by a bill in chancery filed by the petitioners, *Thomas Wright, P. Fabri, and F. Catalacci*, against the bankrupt *John Wright*, and the assignees, for payment of their annuities, and was decided upon demurrer in favour of the annuitants. The assignees having then put in their answer, the bill was amended, so as to pray for accounts of the general administration of the testator's estate; but no decree had been pronounced. The prayer of the present petition was, (among other things,) that the petitioners might be at liberty to prove against the separate estates of *A. G. W. Biddulph* and *John Wright* the sum of 2046*l.*, without prejudice to the suit in chancery, or to their right to claim the whole of such sum; and that a sufficient sum to answer the dividend on such proof might be retained and invested.

Mr. *J. Cooke*, in support of the petition.

Mr. *Dixon*, for the assignees. There is no evidence that the executors are indebted to the estate in the amount sought to be proved, or in any other amount; their accounts not having been yet taken. And, as the matter is now in litigation in another court, it is to that court that the petitioners ought to have applied to establish their claim, before they came here to prove. The Court has not even a *prima facie* case to proceed upon.

Mr. *J. Cooke*, in reply.

Sir JOHN CROSS.—I think the Order should not be limited in the manner sought by the prayer, but should extend to a reservation of the whole sum of 2046*l.*

The Order, so far as regarded this part of the petition, was, that the assignees should pay into Court the sum of 2046*l.*, subject to the further Order of the Court; the money to be laid out; and all parties to be at liberty to apply. The petitioners were, in the first instance, to pay the assignees' costs, and their own.

1842.

Ex parte  
WRIGHT  
and others.

Ex parte ROBERT NEAVE RICHARDS and JAMES BRIANT.

—In the matter of ROBERT RICHARDS, JAMES BRIANT, and JAMES COKER.

THIS was a petition of two of the bankrupts to annul the fiat, on the ground of a misnomer of one of the petitioners. The act of bankruptcy relied upon was the omission to pay or give security for a debt, according to the provisions of the statute 1 & 2 *Vict.* c. 110. s. 8. In the notice which had been given to the bankrupts under the directions of the act, Mr. *Richards* was named as *Robert Richards*, by which name he was also designated in the fiat. This was the misnomer on which the petitioners relied, as invalidating the fiat. According to the evidence read in support of the petition, Mr. *Richards* was baptized by the name of *Robert Neave Richards*, which name he had always adopted. Two specific instances of his using it were adduced by way of example; one was, that he had subscribed his name thus to the partnership articles, in which he was also throughout so designated; and the other was, that upon a board attached to the cart belonging to the firm, on which the names of all the partners were set forth in full, that of Mr. *Rich-*

Westminster,  
January 28.

*Semble*, that a joint fiat will not be annulled, on account of a misnomer in it of one of the bankrupts, by the omission of one of his christian names.

*Quare*, Whether such a misnomer of a trader, in proceedings under 1 & 2 *Vict.* c. 110, s. 8., is a sufficient ground for annulling a fiat founded upon them.

To prove the existence of such a misnomer, it is not enough to state that the trader was baptized by, and always adopted, another name than that by which he is described. It must appear that he was generally known by such other name.

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Ex parte  
RICHARDS  
and others.

*ards* was written *Robert Neave Richards*. And it further appeared, that on the 14th of November 1841 the petitioning creditors struck a docket against the bankrupts, in which, as well as in the affidavit, Mr. *Richards* was named *Robert Neave Richards*; but no fiat had been issued on this docket. On the part of the assignees, evidence was produced to show that the firm traded under the description of *Richards, Briant, and Coker*, only; and that the stockbroker of the firm, on being applied to for information as to the name of Mr. *Richards*, gave it as *Robert Richards*. An action had been brought against him by this name by the petitioning creditors, and he had taken no objection on the ground of a misnomer. At the opening of the fiat on the 28th of December, Mr. *Richards* and his solicitor attended and stated the defect in the proceedings to the Commissioner, and submitted that Mr. *Richards* ought not to be called upon to surrender; to which opinion the Commissioner also inclined, but referred the solicitor to another Commissioner then sitting, who gave his opinion that Mr. *Richards* ought to surrender, but that the fiat should be amended. The Commissioner, before whom the fiat was opened, then called on the bankrupt to surrender, which he accordingly did, protesting that he did not, by taking that step, intend to waive any objection, or to acquiesce in the validity of the proceedings.

Mr. *Keene*, and Mr. *Bilton*, in support of the petition. The bankrupts have a right to receive from their certificate, when they obtain it, that full protection, which can only arise from the proceedings being regular; and even if, by the assistance of evidence of identity, a certificate under a fiat in which one of the bankrupts was misnamed might be made use of, still the petitioning creditor has no right

to occasion this inconvenience and expense by his carelessness, especially when it appears that he was fully aware of the bankrupt's correct name, having used it in a former proceeding. In *Ex parte Forshaw* (a), the Lord Chancellor refused to order a commission to be amended, in which there was a mistake, and directed a *supersedeas* at the expense of the petitioning creditor. These observations apply to the misdescription in the fiat. But the misdescription in the proceedings under the statute 1 Vict. c. 110. s. 8. is of still greater importance. The enactment is a penal one, and a person cannot be declared a bankrupt under it, unless its provisions are strictly observed.

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Mr. *Bacon*, for the petitioning creditor. That the mistake, if it be one, will not prevent the certificate from being given in evidence, is clear from the case of *Stevens v. Elizée* (b); where, it appearing that a person who had traded under the name of *Père Elizée*, was described in the commission as *Vincent Tallachon*, Lord *Ellenborough* only required evidence of the defendant having been once called *Vincent Tallachon*, and of his being the individual named in the commission. And in *Ex parte Gilligan* (c) the Court refused to annul a fiat, on the ground of the bankrupt being named in it *John Gilligan*, instead of *John Christian Gilligan*. [Sir *J. Cross*. Have you an affidavit to show that Mr. *Richards* was known by the name of *Robert Richards*?] We have what is stronger, namely, the fact of an action being brought against him in that name by the petitioning creditors, to which he appeared; thereby admitting that to

(a) 1 G. & J. 368.

(c) 1 M. D. & D. 144.

(b) 3 Camp. 256.



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be a correct designation. [Sir *John Cross*. The most important question seems to be that, with reference to the act of bankruptcy. The statute renders necessary an affidavit of debt, and you have sworn that a person named *Robert Richards* is indebted to you. Supposing that not to be the name of Mr. *Richards*, the petitioner, are you entitled to say that he has committed an act of bankruptcy? That part of the argument is not affected by the authorities to which you have referred.] The substance of the affidavit is, not that *Robert Richards* is indebted to the petitioning creditors, but that a partnership, consisting of *Robert Richards*, *James Briant*, and *James Coker*, are so indebted; and the notice is left at their place of business. Would not a judge direct the jury, that if they were satisfied of the identity of the parties, they ought to find in favour of the validity of the fiat,—as Lord *Ellenborough* did in *Stevens v. Elizée* (a)?

Mr. *Keene*, in reply. In *Stevens v. Elizée*, the name by which the bankrupt was described in the commission was his real name; and the objection was, that another name under which he had traded should have been added with an *alias*. And as to the case of *Gilligan v. Gilligan*,—that case was decided on the ground, that the bankrupt did not, on surrendering, nor afterwards on examination before the Commissioner, explain that he was not properly named; whereas here Mr. *Richards* stated the objection at once, and protested that he did not, by surrendering, intend to acquiesce in the proceedings.

Sir JOHN CROSS.—This is an application on the part of two out of three bankrupts to annul the fiat, on the

(a) 3 Campb. 256.

ground of a misnomer of one of the three ; and if the act of bankruptcy is to be invalidated, or if the fiat is to be invalidated by reason of the misnomer, the burden of proof lies upon the party alleging the misnomer to exist. Now, with regard to the description of the bankrupt in the fiat, whether it is a misnomer or not, does not appear material to the present question ; as I am of opinion, that, if it were a misnomer, that circumstance would not be sufficient to invalidate the fiat. But it is another and a distinct question, whether a party could be held to have committed an act of bankruptcy, under the proceedings directed to be taken by the 1 & 2 Vict. c. 110. s. 8., if he were misnamed in those proceedings. The first question, however, that arises is, whether Mr. *Richards* has, in fact, been misnamed ; and I do not say, that, if this were proved to be the case, the fiat could be supported under the section to which I have referred. It appears, that the party, called *Robert Richards* in the fiat, was generally known by the name of *Richards* only ; that being the name under which he traded in copartnership with the other parties named in the fiat. The style of the firm was *Richards, Briant, and Coker* ; and Mr. *Richards* was, consequently, known not as *Robert Richards*, or as *Robert Neave Richards*, but as the partner in this firm of *Richards, Briant, and Coker*. What, then, is the evidence of misnomer ? The petition does not state, that Mr. *Richards* was not generally known or called by the name of *Robert Richards* ; nor is there any evidence to that effect. But Mr. *Richards* states, that he always adopted the name of *Robert Neave Richards*, and mentions two instances of the fact ; one being that of the inscription on the cart, and the other that of his signature of the partnership articles.

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On the other hand, it is shown that the respondents traded with him by the name of *Richards*, only, in conjunction with two other individuals, as to whose names no mistake is alleged to have been made; it appears, further, that, when inquiry was made of his stockbroker as to what his name was, the reply was that it was *Robert Richards*; and, in addition to those circumstances, there is that of its being customary, where a party has a double name, to designate him by the first only; that is the way, in which such a name is usually treated. For these reasons, and because I find no proof of a misnomer besides the two facts of the name *Robert Neave Richards* being inscribed on the cart, and its being affixed to the partnership articles,—there being, moreover, not one witness brought forward who could swear that he always knew Mr. *Richards* by that name, and Mr. *Richards* not taking upon himself to say that he was so known,—I do not think that the allegation of a misnomer is made out, or the regularity of the proceedings under the recent statute impeached. The petition must, therefore, be dismissed; but I make no Order as to costs, except that the petitioning creditor is to take his out of the estate.

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Ex parte JOHN GETTING.—In the matter of JOHN  
BURNIE.

Westminster,  
January 29.

In the proceedings under a London fiat the bankruptcy is

**THIS** was a petition to rescind an Order annulling a fiat for want of prosecution. The fiat was issued on found on the 14th day, and advertized on the 15th, without any intermediate notice of the adjudication being given at the office. On the 15th day an application is made by another party for a new fiat, and to annul the former, for want of prosecution; and on the 16th day an Order to that effect is made. A petition to rescind this Order dismissed; there being no statement in the petition, or in the affidavits on either side, as to the solicitor who obtained the Order having notice of the adjudication; but there being grounds for suspecting collusion between the bankrupt and the party suing out the annulled fiat.

the 3d of January; but the adjudication did not take place till the 17th, which fell on a Monday. It was advertized on the 18th; but, on the morning of that day, and before the publication of the Gazette, another creditor, named *Frederick Figge*, the present respondent, applied under Lord *Rosslyn's* Order (a) for an Order to annul, and for a new fiat, which was ordered accordingly on the 19th; the usual affidavit having been made by the respondent's solicitor, that he had searched the Gazettes, and found no advertisement of an adjudication. On the 22d the bankruptcy was found under the respondent's fiat.

Mr. *Bacon*, in support of the petition. The adjudication under the fiat, which has been annulled, took place within the proper time, and was advertized as soon as possible, and before the issuing of the respondent's fiat. The respondent's solicitor does not venture to swear, that he did not know the adjudication had taken place when he sued out his fiat. He knew that the day,

(a) " I do hereby order, that any commission of bankrupt, which shall be sued out from and after the 20th day of June instant, and to be executed in the city of London, shall be supersedable for want of prosecution at the expiration of fourteen days, and not sooner, after the date thereof; and that any commission of bankrupt, which shall be sued out from and after the said 26th day of June instant, and not be executed in the city of London, shall be supersedable for want of prosecution, at the expiration of twenty-eight days, and not sooner, after the date thereof; and I do further order, that one day shall elapse after the expiration of the said fourteen or twenty-eight days, before any Order shall be made for such *supersedas*; and that the application which shall, in the course of that day, be first made by any other attorney or solicitor than the attorney or solicitor at whose instance the supersedable commission was issued, for a *supersedas* of such commission, and for a new commission to be issued, shall be preferred to an application for the same purposes by the attorney or solicitor, who sued out such supersedable commission." June 26th 1793.

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on which he took that step, was one on which the London Gazette was published, and it was very easy for him to ascertain that the adjudication had been made. And, although he joins his client in all the other passages of the affidavit, he is silent when he comes to the passage relating to ignorance of the adjudication. The authority of *Ex parte Ellis*(a) consequently applies. In that case Lord *Eldon* said, "there is a positive Order, giving fourteen days to proceed on the commission;" and again, "I cannot go the length of saying the Order is not satisfied till publication in the Gazette. Suppose the adjudication was on Wednesday, it cannot be published till Saturday. When this solicitor applied at the office on Monday, if he had stated, that he had been informed the party was declared a bankrupt on Saturday, though too late for the Gazette, he would not have had a commission;" and the second commission was superseded. It is, indeed, very doubtful, whether an Order to annul, for want of prosecution, can be supported, when it is made after an actual adjudication has taken place (b).

Mr. *Wood*, for the respondent. The facts of the case are these. The respondent took proceedings under the act, 1 & 2 *Vict.* c. 110. s. 8., with the view of issuing a fiat against the bankrupt; and on the 5th of December, being the first day after the expiration of the twenty-one days mentioned in the section, an act of bankruptcy having been committed under its provisions, he proceeded to strike a docket, but found that a fiat had been sued out on the petition of a person named *Hughes*, a personal friend of the bankrupt on the 4th. No proceedings were taken

(a) 7 *Ves.* 135.

(b) See *Ex parte Baker*, 2 D. & C. 366.

under this fiat; and on the 29th of December, when the respondent was again about to take proceedings, he found that the first fiat had been superseded, and that a second fiat had been sued out in the name of another petitioning creditor, but by the same solicitors. It is this second fiat, which is now sought to be revived; although it was not prosecuted till the last moment prescribed by the act. This is not an application, therefore, which should meet with any favour; the object of both the fiats sued out by the petitioners' solicitors being, evidently, not the distribution of his assets among his creditors, but the delay and defeat of another creditor, who has that object in view. [Sir *John Cross*. How does it appear, that the petitioner knew of the act of bankruptcy of the 6th of December?] The bankrupt knew of it, and it is sworn that the petitioner is acting in concert with him. *Ex parte Henderson (a)* is exactly in point. There the practice was settled to be, in the case of a country commission, to issue a supersedeas on the 30th day, (which answers to the 16th day in the proceeding under a London commission,) on an application on the 29th, unless notice was given at the office on the 29th that the bankruptcy was found. And the rule was rigidly applied in that case, although the adjudication took place within the proper time, that is to say, on the 28th day,—and although from the distance of the place where the commission was opened, it was impossible that notice should arrive as early as the 29th day. There is no foundation, therefore, for the statement, that a fiat cannot be superseded after the adjudication has taken place; a proposition, which is also contradicted by the more recent case of *Ex parte Westall (b)*, where the

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(a) 2 Ro. 190.

(b) 4 Dea. &amp; C. 350.

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Court refused to rescind an Order to annul, which was made after the adjudication. With regard to the absence of an affidavit on the part of the respondent's solicitor, as to his ignorance of the adjudication, the petitioner does not raise that issue by stating either on this petition or affidavits, that the solicitor had any knowledge of it.

Mr. *Bacon*, in reply. To bring the case within the authority of *Ex parte Henderson (a)*, the respondent must show that his solicitor had no notice of the adjudication, which had taken place the day before that on which his fiat was issued. [Sir *John Cross*. The rule is, that if the adjudication has not appeared in the *Gazette*, it must appear by notice given at the office; you gave no such notice.] The respondent's solicitor abstained from making any inquiry at the office; and the rule as to giving notice there, is not an invariable one. It was not acted upon in *Ex parte Ellis (b)*, and yet the *supersedeas* was quashed. With regard to the statements made as to circumstances anterior to the 3rd of January, they are wholly immaterial to the present question; Lord *Eldon* having said in *Ex parte Ellis (b)*, that "if there were doubts as to the petitioning creditor's debt, or an apprehension that this was a friendly commission, those might be proper considerations. But it is not a correct use of those considerations, to take out another commission, as if the former had not been proceeded on,—if it appears that it had been proceeded on. The party might quarrel with the commission and petition against it; but upon none of those grounds can a solicitor take out another, alleging the former was not proceeded on, if it was proceeded on, within Lord *Rosslyn's* Order."

(a) 2 Ro. 190.

(b) 7 Ves. 135.

Sir JOHN CROSS.—From all the circumstances of this case, there appears to have been a race between a *bonâ fide* creditor, and one who was acting in collusion with the bankrupt. If the petitioner were allowed to succeed on the present application, he, or rather his solicitors, might go on issuing fiats until the two months had expired, to which the statute 1 & 2 Vict. c. 110. s. 8. limits the respondent, in suing out a fiat on the act of bankruptcy on which he is proceeding. He might thus be entirely defeated by parties, who had no intention of proceeding, *bonâ fide*, to procure a distribution of the bankrupt's effects among his creditors. Under these circumstances, I think the respondent's fiat is entitled to preference over the other, and that the petition must be dismissed, with costs.

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Ex parte  
GETTING.

Ordered accordingly.

Ex parte ROGERS.—In the matter of JONES.

MR. WOOD, on the part of the respondent to this petition, which was in the paper of the day, applied for the permission of the Court, that it might stand over to a future day, in order that the respondent might have time to file affidavits, in rejoinder to the petitioner's affidavits in reply, which were only filed on the 28th instant, and which made out quite a new case to that stated in the petition.

Westminster,  
January 31.

Where the petitioner made out a new case in his affidavits in reply, which were filed only three days before the petition was set down for hearing, the Court permitted the hearing to be postponed, in order that the respondent might have time to answer the affidavits; but as he had given no notice of the application, he was ordered to pay the costs of the day.

Mr. Anderdon, *contra*.

notice of the application, he was ordered to pay the



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Ex parte  
ROGERS.

Sir JOHN CROSS.—As the petitioner has filed affidavits so late as Friday last, which set up a new case against the respondent, I think it is right that the respondent should have time to answer them; but, inasmuch as he has not given the petitioner notice of this motion, he must pay the costs of the day.

Ex parte ESTHER WELLS, by JOHN HENRY PAGET, her next friend.—In the matter of EDWARD WHITMORE and others.

Westminster,  
January 29.

*Feme covert.* petitioning by her next friend, permitted to prove the value of a legacy of stock bequeathed to her separate use, but transferred into the name of her husband, who sold it out and became bankrupt, and a trustee appointed to receive the dividends.

THIS was the petition of the wife of one of the bankrupts, by her next friend, for leave to prove against her husband's estate, the value of a legacy of stock bequeathed to her, with a direction that it was to be for her separate use, and free from the control of her husband. The stock had been, by the petitioner's request, transferred into her husband's name; but she now stated, by her petition, that this was done upon the understanding that her husband should hold the stock as a trustee for her, and that he continued to pay her the amount of the dividends. He had, however, sold out the stock, and applied the proceeds to his own use.

Mr. Keene, for the petition.

Mr. Tenison Edwards, for the assignees, consented to such Order as the Court might think proper to make.

The COURT gave the petitioner leave to make such proof as she could establish, and referred it to Mr. Ayrton to appoint trustees, or a trustee, to receive the dividends on the proof.

Ex parte POOLEY.—In the matter of JOHN ATKINSON.

1842.

*Serjeants' Inn,  
March 3.*

THIS was a petition for the usual Order, in the case of an equitable mortgage. The deposited documents were the certificates of certain shares in a company called the Merchants' Shipping Company, established at Stockton-upon-Tees, in which the bankrupt was a shareholder. His own trade was carried on at Kendal, in Westmoreland. By the deed of settlement of the company, dated the 26th of January 1838, it was among other things provided, that the funds of the copartnership should consist of the sum of 15,000*l.*, divided into shares of 25*l.* each; that persons, only, who were shippers of goods and merchandize, should be eligible to hold shares in the copartnership; that, if any of the copartners for the time being should, before the termination of the copartnership, be desirous of withdrawing himself, herself, or themselves therefrom, and should signify such his, her, or their desire, by a previous writing or previous writings, under his, her, or their hands, to be delivered to the clerk or agent for the time being of the copartnership, then and in every such case so happening, the partners or partner so desirous of withdrawing might assign and transfer his, her, or their share, or respective shares and interests, of and in the joint trade, and of and in the capital stock and effects therein, and all gains and profits attending the same from the settlement of the last preceding annual account, to such person or persons as should be approved by the general committee for the time being; and from that time the person or persons, to whom such assignment or transfer should be made, should stand in the place of the partner or partners so desirous of withdrawing.

A shareholder in a company, the settlement deed of which prescribes a specific mode for the transfer of shares, and excludes from being shareholders all who are not shippers of goods, deposits the certificates of his shares by way of mortgage, with a person not of the prescribed description, and without following the prescribed mode of alienation. *Held*, that the deposit created a valid lien, as against his assignees, on his becoming bankrupt. *Semble*, that reputed ownership of shares must be proved to have existed, and is not conclusively to be inferred from the absence of notice of a lien upon them.

1842.

Ex parte  
POOLEY.

The certificates of the bankrupt's shares in the company were marked respectively 6, 7, 8, and 9, and were deposited by him with the petitioners, together with a promissory note to the following effect:

"Kendal, Feb. 2, 1841.

"On demand, I promise to pay to Mr. *John Pooley*, or order, the sum of 100*l.*, with interest, after the rate of 5*l.* per cent. per annum, for value received, for which I deposit the certificates of four 25*l.* shares in the Stockton Merchants' Shipping Company, as security.

"*John Atkinson.*"

"Witness, *John Hudson.*"

The act of bankruptcy was committed on the 29th of May. The petitioners, on the 9th of June, forwarded to the clerk of the company a written notice of the deposit; not having, as they alleged, at the time notice of any act of bankruptcy having been committed. This allegation was controverted by the assignees, who adduced evidence in opposition to it.

Mr. *Dixon*, for the petition, relied upon *Ex parte Smith, re Styan*, lately decided by the Lord Chancellor (a).

Mr. *Bacon*, for the assignees. The deposit here was not of a policy of assurance, but of certificates of shares, which were subject to an express stipulation, that no person should hold them but a shipper; and a particular form, which was not adopted here, was requisite for the transmission of the property in the shares. [Sir *John Cross*. The assignees cannot be shareholders, and yet they claim the bankrupt's beneficial interest in the shares.

(a) 2 M. D. & D. 219.

Must they not, out of the proceeds of it, pay off the incumbrance?]

1842.

Ex parte  
POOLEY.

Mr. *Dixon*, in reply.

Sir JOHN CROSS.—I am of opinion that there is no sufficient evidence, in this case, of the petitioners having had notice of the act of bankruptcy, previously to their forwarding their written notice to the clerk of the company. But supposing they had given no notice of their security,—that circumstance would not, in my opinion, be sufficient to establish the case of the assignees. They must go further, and show that the bankrupt was the reputed owner of the shares. What is the evidence which has been adduced upon this point? It appears that the bankrupt carried on his trade at Kendal, while the business of this partnership was carried on at Stockton-upon-Tees, and the bankrupt appeared to be no otherwise connected with it than as a shareholder of the company. No one, with whom the bankrupt dealt, has come forward to say that he considered the bankrupt to be the owner of these shares; and I therefore am of opinion here, as I have been in previous cases, that it lies upon the parties asserting the fact of reputed ownership to make out that fact. Having failed to do so, they have not succeeded in establishing any case against the lien of the petitioners.

ORDER, as prayed.

1842.

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*Serjeants' Inn,*  
*March 3.*

One of several residuary legatees, with the concurrence of the others, induces the executors to sell out stock forming part of the residuary estate, and to lend him the proceeds, on his executing to them a warrant of attorney and depositing certain title deeds, as a security for the replacement of the stock and payment of the dividends, but without any express lien upon or reference to his share in the residue. *Held*, that the executors had, on his bankruptcy, a lien on the share.

Ex parte MAKINS.—In the matter of MAKINS.

THIS was the petition of the surviving executors of the will of the bankrupt's father, praying that they might be declared to have a lien on the bankrupt's interest under his father's will, and for leave to prove for so much of their claim, as the bankrupt's interest, and also another security which he had deposited with them, should be insufficient to realize.

Under the will, and a subsequent assignment by another legatee, the bankrupt was entitled to one-fourth share of the general residuary personal estate of the testator. Some time after the testator's death, the petitioners, at the request of the bankrupt and the other parties beneficially interested in the residue, sold out a sum of 500*l.* stock, part of the testator's assets, and advanced the proceeds to the bankrupt, who was at that time already indebted to them in a sum of 178*l.*, in respect of a debt of his brother's, which he had undertaken to pay before the stock was sold out. The bankrupt, to secure the replacement of the stock, executed a warrant of attorney, and deposited with the petitioners the title deeds of certain leasehold estates. There was no other memorandum of the transaction than such as was contained in the defeazance to the warrant of attorney, which, after providing that execution should only be issued in the event of the bankrupt's failing to replace the stock and pay the dividends, and also the 178*l.* which he had undertaken to pay, stated, that, as a collateral security for replacing such stock, and for payment of the sum which would become due in respect of the dividends thereon in case the same had not been sold, and for securing payment of the sum

of 178*l.* 8*s.* 2*d.*, and interest thereon, the bankrupt had delivered and deposited with the petitioners the title deeds of certain leasehold premises belonging to him. The petitioners now claimed a lien on the bankrupt's share in the residue, for the amount due in respect of the 500*l.* sold out, and the dividends thereupon.

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Ex parte  
MARINS.

Mr. *Anderdon*, and Mr. *Rogers*, in support of the petition. The sum advanced was a portion of the estate, and must be considered to have been accepted by the bankrupt, in satisfaction of his share of the residue. *Jeffs v. Wood* (a), *Ranking v. Barnard* (b), *Richards v. Richards* (c), and *Ex parte O'Ferrall* (d).

Mr. *Prendergast*, for the assignees. An executor cannot set off, against a demand upon him as executor, a debt due to him individually (e). The nature of the contract between the parties, and of the security, is defined and limited by the defeazance of the warrant of attorney.

Mr. *Anderdon*, in reply, was stopped by the Court.

Sir JOHN CROSS. It is very true, that the defeazance to the warrant of attorney does not expressly give a lien upon the bankrupt's share in the residuary personal estate; and, as a general rule, there is no question but that we are confined to the four corners of an instrument, in discovering the meaning of those who are parties to it.

(a) 2 P. Wms. 128.

(c) 9 Price, 219.

(b) 5 Mad. 32.

(d) 1 G. & J. 347.

(e) Williams on Executors, 1457, citing *Whitaker v. Rush*, Amb. 407; *Medlicot v. Bowes*, 1 Ves. 208; *Gale v. Luttrell*, 1 You. & Jer. 180.

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But it frequently happens, that it is not possible to understand the scope and meaning of an instrument, without looking at the position of the parties, and the posture of affairs at the time of its execution. Now, in this case, what was the position of the parties to this transaction? Why he, who applied to the executor for the advance of the 500*l.* stock, was entitled to one-fourth share of all the testator's residuary estate in the hands of the petitioners. Is it possible then to doubt, that the 500*l.* stock was advanced out of the estate of the testator, and with the knowledge of the bankrupt? Must not the transaction have been understood by the bankrupt, as a dealing with the personal estate of the testator, and as a transfer of part of that estate? Suppose the executors had been pressed by the bankrupt to distribute this residue, and had declined to do so, without taking this transaction into account; in such a case the bankrupt must have gone into a Court of Equity to obtain relief, and no Court of Equity would have listened to his claim, if he would not first satisfy this demand on the part of the petitioners. It appears, therefore, that the rights of the bankrupt under the will, and the claim on the part of the petitioners, are inseparably connected; and the executors have a right to look to his share of the residue, for restitution of that portion of the testator's estate which they sold out for the benefit of the bankrupt.

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Ex parte WILLIAM PARKER, committe of the estate of ROBERT PARKER, a lunatic.—In the matter of SAMUEL STOCKS, the elder, and SAMUEL STOCKS, the younger.

*Serjeants' Inn,  
March 3 & 4.*

THIS was a petition complaining of the rejection of a proof, which the petitioner had tendered against the joint estate of the bankrupts; and the question turned on the sufficiency of certain transactions between the petitioner, as a committee of a lunatic's estate, and the bankrupts, to convert the debt, which was originally due from the bankrupt *Samuel Stocks*, the elder, separately, into a debt from the firm; or, at all events, to give the petitioner a claim upon the firm, in addition to his separate demand against the elder bankrupt.

A trader being indebted to a lunatic in the amount of the purchase money of a business, and the machinery and stock in trade, after carrying on the business alone for some time, enters into partnership, under an agreement by which the stock in trade and property of the sole business were to belong to the firm, which was to take upon itself the liabilities of the sole business. The firm renders an annual account, in its own name, in respect of the debt to the committee of the lunatic, who makes no objection to this form of the account. *Held*, on the firm becoming bankrupt, that the committee was not entitled to prove against the joint estate. *Quære*, Whether he had power, and whether the Lord Chancellor could have given him power, to convert the separate into a joint liability.

It appeared that the debt arose under the following circumstances. The lunatic, and his brother, *Thomas Parker*, since deceased, carried on, in 1826, previously to the lunacy, the business of calico-printers and bleachers, in copartnership, at Heaton Mersey; and in August 1826 the bankrupt *Samuel Stocks*, the elder, became the purchaser of the business and of the whole of the machinery and stock, and other effects belonging to the lunatic and his brother upon the premises where their copartnership trade was carried on, and became tenant of the premises at a yearly rent. Upon this purchase, a sum of 20,000*l.* became due from the elder bankrupt to the lunatic and his brother, as appeared by an account stated between them at the time. To secure the payment of this sum of 20,000*l.* and interest, a warrant of attorney, dated the 1st of August 1826, was executed by the elder bankrupt, empowering the lunatic and his brother, or the survivor of them, to enter up



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judgment for 25,000*l.*; and judgment was forthwith entered up. In 1828 *Thomas Parker*, the brother of the lunatic, died, and the lunatic became entitled to the debt due from the elder bankrupt. In the same year the commission of lunacy issued, under which the petitioner was in May 1829 appointed committee of the lunatic's person and estate. From this period up to the year 1835, the elder bankrupt continued to carry on the business with the machinery and stock which formed the subject of the purchase. In 1835 he took his son into partnership, without any premium, but under an agreement, according to which all the then existing debts and liabilities of the sole business of the elder bankrupt were to be transferred to the account of the partnership, and thenceforth to become joint debts and liabilities of the firm; and all the machinery, stock, property, and effects theretofore employed by the elder bankrupt in his sole business, were to be transferred to and become partnership property. This agreement was stated to have been acted upon ever since, both by the bankrupts and the petitioner; the debt due to the lunatic, which had been reduced by payments on account, having been adopted by and placed to the account of the partnership, and the bankrupts having in an account stated and rendered by them on the 31st December 1837, as partners to the petitioner, admitted and acknowledged the sum of 13,206*l.* 19*s.* 5*d.*, with a further sum of 660*l.* 7*s.* 6*d.*, to be due and owing from the partnership to the petitioner, as committee of the lunatic. It was further stated, that, from Christmas 1837 to the bankruptcy, the bankrupts had paid to the petitioner the rent of the premises, and had continued annually to render to him their accounts in respect of the debt, treating it throughout as one

adopted by and due from the partnership; and that the petitioner, in his character of committee, had never objected to that mode of treating the debt; but, on the contrary, had assented to the same, and acquiesced therein. The last of these accounts was rendered at Christmas 1840, being the last Christmas preceding the fiat, which was issued on the 31st of July 1841. On the petitioner tendering his proof against the joint estate, no objection was made as to the amount claimed; but the Commissioners held, that it could only be made against the separate estate of the elder bankrupt.

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Mr. *Bacon*, and Mr. *Sydenham Clarke*, in support of the petition. The petitioner in this case asks for no more than he is justly entitled to for the machinery and stock in trade, on which he had a claim for the unpaid purchase-money. Having become the property of the partnership, it would be only reasonable, even if there were no agreement on the subject, that the firm who take the property should be liable to discharge the amount remaining due in respect of it; but there are in this case acts on both sides abundantly sufficient to constitute an acceptance and adoption of the joint liability of the firm, in lieu of the separate liability of the elder bankrupt. Very slight circumstances are requisite for the purpose of establishing the fact, that such an arrangement has been assented to by the parties; *Ex parte Williams* (a); *Ex parte Jackson* (b); *Ex parte Clowes* (c); *Ex parte Kedie* (d); *Ex parte Whitmore* (e).

(a) Buck, 13.

(c) 2 Bro. C. C. 595.

(b) 1 Ves. jun. 131.

(d) 2 D. &amp; C. 321.

(e) 3 M. & A. 627; 3 Deac. 365; see *Ex parte Jackson*, 2 M. D. & D. 146, which was in fact an appeal from the decision in *Ex parte Whitmore*; and see *Ex parte Liddiard*, 2 M. & A. 88, note, where the authorities are collected.

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Mr. *Bethell*, and Mr. *Rolt*, for the assignees. It is perfectly immaterial, whether the acts detailed in the petition and the affidavits in support of it are such, as would, between competent parties, be regarded as satisfactory evidence of an agreement to convert the separate into a joint liability ; for in this case it is clear, that one of the parties to this supposed contract had no power or authority whatever to enter into any such agreement, being the committee of a lunatic, and having no right to alter the property except under the powers conferred upon him by the great seal, under the statute *de prerogativa regis*, 17th Edward II. The words of that enactment are, “ also the king shall provide, when any that before-time hath had his wit and memory happen to fail of his wit, as there are many having lucid intervals, that their lands and tenements shall be safely kept without waste and destruction, and that they and their household shall live and be maintained competently from the issues of the same, and the residue beyond their reasonable sustentation shall be kept to their use, to be delivered unto them when they recover their right mind ; so that such lands and tenements shall in no wise within the time aforesaid be aliened, nor shall the king take any thing to his own use, and if the party die in such estate, then the residue shall be distributed for his soul, by the advice of the ordinary.” It is therefore very doubtful, whether the Lord Chancellor has any authority to give validity to such an alteration in the lunatic’s property, as is here in question. It is, however, sufficient to say, that no order has been obtained from the Lord Chancellor for the purpose ; it being the practice never to confirm proceedings taken by a committee, without the sanction of the Court, if they are such as to require

that sanction, although they might have been of a character which the Court would have considered unobjectionable, upon a proper application being made; *Ex parte Marton* (a).

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Mr. *Bacon*, in reply. Whatever might be the consequences to the committee himself, of acting without the protection and indemnity of an Order of the Lord Chancellor, such an Order is not requisite to enable him, as regards third parties, to deal with the estate as he has done. This appears, from the terms of the grant by the crown of the custody of the estate of a lunatic, which is in the following terms: "know ye also that we, of our like special grace, and of our own certain knowledge, and mere motion, have given, committed, and granted, and by these presents, for us, our heirs, and successors, do give, commit, and grant unto the said —, the custody, regulation, occupation, disposition, and receipt, as well of all manors, messuages, lands, tenements, houses, farms, revenues, services, and hereditaments, with the appurtenances, and of all rents, revenues, and profits thereof, which the aforesaid *A. B.* hath, or ought to have, in possession or reversion, or which, by any lawful ways and means, at any time or times hereafter, may or ought to come, descend, or accrue to the said *A. B.*, or which any other or others hath, or may have, to the use and profit of the said *A. B.*, in the county of — aforesaid, or elsewhere within our kingdom of Great Britain, as also the custody and government of all the goods and chattels, farm stock of cattle, wealth, plate, debts, money, jewels, traffic, merchandize, and other commodities and profits whatsoever to the said *A. B.* be-

(a) 11 Ves. 397.

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longing, or in any manner appertaining, and also the *use and negociation* of the same, to the use and behoof, profit, and advantage of the said *A. B.*, and for the maintenance, sustenance, and support of the said *A. B.* and his family, (if he hath any, or in time to come may have), and also for the maintenance, preservation, and repair of the messuages, lands, tenements, houses, farms, and the residue of the premises of the said *A. B.*"

Sir JOHN CROSS. In this case, judgment was entered up so long ago as 1826, at the suit of *Thomas and Robert Parker* against *Samuel Stocks*, the father, for 25,000*l.* *Thomas Parker* died. *Robert Parker* became lunatic, and the petitioner is his committee duly appointed. So there is no question but that for many years this was the separate debt of *Samuel Stocks*, the elder. Now it is said, that about four years before the bankruptcy, when the debtor had entered into partnership with his son, the debt became the debt of the firm, and was thenceforth jointly due from the father and the son. Considering the magnitude of this debt, it is impossible to conceive, that, if the intention of the parties was really so to change the nature of it, they should not have acted with more deliberation upon the subject, than they are here represented to have done. No express contract is produced,—no writing applicable to such a contract,—and, notwithstanding all the evidence which has been adduced in support of the petition, the only particle of it leading to such a conclusion is this, that, after the partnership was formed between the father and the son, the latter was in the habit of rendering annually an account to the committee, and of transmitting to him the payments which became due from time to time in re-

spect of the debt, and of the buildings which were rented by the elder bankrupt of the lunatic, and that the account purported to be between the partnership and the petitioner, to which the latter made no objection. That is all the evidence relied upon, as constituting a contract to transmute the separate debt of the elder bankrupt into the joint partnership debt of the two. Now I do not think that this is sufficient evidence of any such contract. Suppose the converse of the case were before me, and the petitioner were proceeding against the elder bankrupt,—could it have been said, against the petitioner, that this mode of payment was sufficient to constitute a contract to discharge the father from the claim? It appears to me, that there was no intention to convert the separate into a joint debt, and that the parties never contemplated such a thing; and I therefore am of opinion, that the transaction in question, coupled with the circumstances attending it, amounted only to a mode of payment, and not to a contract to change the nature of the debt. Upon the subject of the competency of the petitioner so to contract, it is unnecessary for me to give any opinion. The express authority conferred by the grant from the crown to negotiate the debt of the lunatic, raises a doubt upon that subject in my mind, which I own I did not entertain, before my attention was called to those words. But I think I need not entertain that question; it being sufficient for me to say, that there is no evidence of an intention to convert the separate into a partnership debt.

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Petition dismissed with costs.



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*Serjeants' Inn,  
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A memorandum of deposit, accompanying an equitable mortgage, stated, that the bankrupt had deposited "the deeds and documents under which I hold the steam mills, cottages, land, buildings, and premises at L." *Held*, that the equitable mortgagee had a lien on the fixtures, whether erected before or after the time of the deposit, and including those that were removeable as between landlord and tenant.

Ex parte THOMAS PRICE and THOMAS BACKHOUSE.—

In the matter of WILLIAM STEAD.—

**THIS** was a petition of the public officers of the York City and County Banking Company, praying, on behalf of the company, for the usual Order in the case of an equitable mortgage.

In January 1837, the Banking Company, having made large advances to the bankrupt, applied to him to give them some security for the balance then due, and which might thereafter become due from him on his banking account; and the bankrupt thereupon agreed to deposit the title deeds relating to certain steam mills, cottages, land, buildings, and machinery, near Boroughbridge, in the county of York, of which the bankrupt was possessed of an estate in fee simple. The bankrupt accordingly deposited all the title deeds relating to the premises with the agent of the Banking Company at Boroughbridge, with whom a written memorandum of the agreement, signed by the bankrupt, was also deposited. The petitioners alleged, that they had caused search to be made for the original memorandum of deposit, but had not been able to find it; their agent alleging that it was lost. The solicitor of the bankrupt, however, who was afterwards the solicitor of the assignees, stated that he prepared the memorandum, and attested the execution of it, and that he had in his possession a draft of it, which was as follows:

"Memorandum, that I, the undersigned *Wm. Stead*, of Boroughbridge, in the county of York, merchant, have this day deposited with the York City and County Banking Company, at Boroughbridge aforesaid, the deeds and documents under which I hold the steam mills, cot-

tages, land, buildings, and premises, at Langthorpe, in the county of York aforesaid, to secure to them all monies now owing by me, and which shall in future be advanced to me by the said Banking Company, together with banker's commission, and all other usual charges, and also all balances, which shall at any time be due from me on my banking account, which I keep with the said banking company, together with interest for the same, after the rate of 5*l.* per cent. per annum. Provided always, that the total amount of money recoverable upon and to be secured by the deposit before mentioned, shall in no case exceed the sum of 2500*l.* As witness my hand, this 20th day of January 1837.

" (Signed) Wm. Stead."

" Witness, *R. Holmes.*"

It was proved by the son of the bankrupt, who was a solicitor, that he saw the original of the above memorandum in the possession of the agent of the bank at Boroughbridge, and that he took a copy of it, and that the same was to the purport and effect above mentioned.

After the date of the above memorandum, the bankrupt erected a building for crushing bones, and also another building for crushing oil seeds, and set up in them the necessary machinery for those purposes, which was worked by means of the steam engine, and which, as well as the machinery in the bone-mill and oil-mill, was affixed to the freehold; the steam engine so much so, that it could not be removed without breaking up the building and seriously injuring it.

It was stated in an affidavit, in support of the petition, that the bankrupt, in order to induce the bank to make him further advances to the amount of 5000*l.*, called on the manager of the bank with a valuation of the property,

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in which was included the steam engine and all the fixtures, making it appear that the whole was valued at 7000*l*. This, he urged, would show that the property would be an ample security, and that the bank might safely advance to the amount of 5000*l*.

On the 14th August 1840, the fiat issued, when there was due from the bankrupt to the Banking Company the sum of 3217*l*.

The affidavits, in opposition, stated, that the steam engine, boiler, and other machinery, were fixed to the brick and timber work of the premises merely by bolts and screws, and that they could therefore be easily removed, without any damage to the buildings to which they were affixed. The bankrupt denied that he said to the manager of the bank, that the fixtures were to be included in the security; and the attorney, who prepared the memorandum of deposit, stated that the instructions for that purpose, given him by the bankrupt, did not specify the steam engine.

Mr. *Bates*, in support of the petition. The objection, as it is understood, which is to be raised by the assignees to this petition is, that the machinery and fixtures are not included in the equitable mortgage; as they are not mentioned in the memorandum of deposit. But the circumstance of the bankrupt bringing to the manager of the Bank a valuation of the property, in which the steam engine and machinery were included, plainly showed that they were meant to be comprised in the equitable mortgage. It has been decided, that, although fixtures are not specified in the memorandum of deposit, and although erected for the purposes of trade, an equitable mortgage of the

property will carry all the fixtures; *Ex parte Broadwood* (a).

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Mr. *Kenyon Parker*, and Mr. *Stevens*, *contrà*. The question in this case is, whether machinery, not attached to the freehold, can pass by this equitable mortgage. It is not disputed, that if any fixtures are actually fixed to the freehold, and are not removeable without damage to the property, they will then pass to the mortgagee, but not otherwise. There is also another question, and that is, whether the conversation of the bankrupt with the manager of the bank will give any lien, which was not given by the original memorandum. By the terms of the memorandum, the bankrupt deposits "the deeds and documents, under which I hold the steam mills, cottages, land, buildings, and premises, at Langthorpe." This, we submit, only relates to *freehold* property, and not to trade fixtures. In *Trappes v. Harter* (b), Lord *Lyndhurst*, in giving judgment, says, that the authorities, to which he there refers, lead to the conclusion, "that where utensils and machinery are erected by the owner, for the purpose of trade only, in a neighbourhood where such utensils and machinery would commonly have been removed, and where this can be done without injury to the inheritance, they form an exception to the general rule, and are not to be taken as part of the inheritance, but as personal estate." And this accords with the opinion of Sir *George Rose*, in *Ex parte Austin* (c), where he thus expresses himself: "I have no hesitation in saying, that where fixtures are capable of removal, as between land-

(a) 1 Mont. Dea. & De G. 631.

(c) 1 Deac. & C. 207.

(b) 2 Cromp. & Mee. 153; 3 Tyr. 603.

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lord and tenant, without injury to the freehold, they are within the order and disposition of the bankrupt."

As to what is stated to have passed between the bankrupt and the manager of the bank, in regard to the valuation of the property, it is nothing but an attempt to extend by parol the effect of a written agreement. But even if the conversation alluded to actually took place, it would show that the Banking Company did not consider the machinery to be included in the original agreement. In *Ex parte Broadwood (a)*, which has been relied on by the other side, the premises were leasehold, and it was suggested by the Court, that there might be a question in that case, as to the fixtures erected since the equitable mortgage. In the present case, the material portion of the fixtures were erected since the deposit.

Sir JOHN CROSS. I will refer to the authorities that have been cited, before I pronounce my judgment. If I should come to an opinion unfavourable to the petition, I shall be glad to hear Mr. *Bates* in reply.

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Sir JOHN CROSS. The only question in this case is, whether the fixtures in the mortgaged premises are included in the memorandum of deposit. No point has been taken by the counsel for the assignees, as to the operation of the section relating to order and disposition; and the case is therefore to be looked at merely with reference to the contract between the parties. The authority of *Trappes v. Harter (b)* has been much relied on by the counsel for the assignees; but the decision of the Court of Exchequer in that case only went to the extent,

(a) 1 Mont. Deac. & D. 631.

(b) 2 Cr. & Mee. 153; 3 Tyr. 603.

that the mortgage there was not intended to include fixtures. It cannot therefore govern the present case. Here, when the equitable mortgage was given by the bankrupt, he was the owner in fee of the whole estate, both buildings and fixtures being his property. That fixtures existed when the deposit was made, there can be no doubt; and it certainly appeared to have been intended to include the whole of them in the equitable mortgage. The memorandum of deposit states, that the bankrupt deposited with the York Banking Company "the deeds and documents under which he held the steam-mills, cottages, land, buildings, and premises, at Langthorpe in the county of York." Now these words seem to imply that there was intended to be no exception in regard to the fixtures, or to any particular portion of the fixtures. To entitle the assignees therefore to any part of the fixtures, it is incumbent upon them to show, that the part they claim was excepted; of which there certainly is no evidence. The assignees say, that part of the machinery was not erected at the date of the memorandum; but it is a matter of perfect indifference, whether the erection of the machinery and fixtures was completed, or not, at the time of the mortgage,—whether part was put up before, or subsequent to that event. Then it is contended, that the mortgage does not extend to those fixtures that were moveable as between landlord and tenant, but only to those that could not be removed without damage to the premises. But I am of opinion, that as there is no proof of any intention to except any portion of the fixtures from the operation of the mortgage, the petitioner is entitled to have all the fixtures disposed of, along with the premises to which they are attached, for his own use and benefit.

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and another.

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The question is, then, which of these articles are to be considered fixtures? It has been said, that the steam engine is a locomotive piece of machinery, and may be easily removed. But I see no reason why a steam engine should be more removeable on the ground of its locomotion, than a door, or a window, which are also locomotive. The assignees, however, will examine for themselves, whether any of the articles in question are, or are not, fixtures.

ORDERED as prayed.

Ex parte THOMAS BROADLEY.—In the matter of JOSEPH WEBB PILCHER.—

*Serjeants' Inn,  
 March 5 & 7.*

A bankrupt, previous to his marriage, became bound to trustees in the penal sum of 3000*l.*, conditioned for payment to them by his executors of an annuity of 150*l.*, in case his intended wife should survive him, in trust for her use and benefit. The bankrupt and his wife were both living. Held, that the trustees could prove for the value of the annuity, under the provisions of the 54th section of the 6 Geo. 4. c. 16., although it was not an annuity in possession.

THIS was the petition of a creditor to expunge a proof that had been admitted, to the amount of 1068*l.* 8*s.* 8*d.*

The deposition of the creditors, whose proof was sought to be expunged, stated, that the bankrupt did by a certain bond or obligation in writing under his hand and seal, bearing date the 5th January 1816, and executed by him previous to and in consideration of the marriage then intended, and shortly afterwards solemnized, between the bankrupt and *Elizabeth* his now wife (then *Elizabeth Walker*, spinster,) become bound to *John Coleman* and *John Pilcher*, in the penal sum of 3000*l.*, with a condition thereunder written for making void the same, on payment by the heirs, executors, or administrators of the said bankrupt, in case the said *Elizabeth Walker* should survive him, unto these deponents, in trust for and for the sole use and benefit of the said *Elizabeth Walker* during her life, of one an-

A petition to the Court of Review to expunge a proof may be presented by *one* creditor; *aliter*, if the application is made to the Commissioner, when it must be by *two*, or more, under the 6 Geo. 4. c. 16. s. 60.

nuity or clear yearly sum of 150*l.*, payable quarterly, as therein mentioned : And the deponents averred, that the said *Elizabeth*, the wife of the said bankrupt, was then living, and that the value of the said contingent interest of the deponents, as such trustees as aforesaid, had been by the Commissioners acting under the fiat calculated and valued at the sum of 1068*l.* 8*s.* 8*d.*, in which sum they alleged that the bankrupt was justly and truly indebted unto them, as such trustees as aforesaid, and for which sum, or any part thereof, they had not, nor had either of them, nor any person, to their or either of their knowledge or belief, for their or either of their use, received any security or satisfaction whatsoever, save and except the before mentioned bond or obligation.

The petitioner alleged, that, as the above-mentioned annuity of 150*l.* was payable only to *John Coleman* and *John Pilcher*, in case the wife of the bankrupt should survive him, and thenceforth only during her life, it was not such a contingent debt contracted by the bankrupt as was capable of valuation, or ought to be valued, by the Commissioners, and that therefore they ought not to have admitted the proof.

Mr. *W. R. Ellis* appeared in support of the petition.

Mr. *Dixon*, *contra*, objected, that the petition to expunge a proof ought, under the provisions of the 6 *Geo.* 4. c. 16. s. 60., to be preferred by *two* creditors, at least; the words of the section being “ whenever it shall appear to the assignees, or to *two or more* creditors who have each proved debts to the amount of 20*l.* or upwards, that any debt proved under the commission is not justly due, either in whole or in part, such assignees or cre-

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ditors may make representation thereof to the Commissioners, &c." Now, in the present case, the petition is only presented by *one* creditor.

Sir JOHN CROSS. The clause of the act referred to only applies to the expunging of a proof by the Commissioners, who had no such jurisdiction before the passing of the act. The Lord Chancellor, whose jurisdiction in bankruptcy is now transferred to this Court, had always power to order a proof to be expunged, whether the petition for that purpose was presented by one, or two, creditors. The application to this Court, instead of to the Commissioners, makes all the difference.

Mr. *Ellis*. The proof in this case was made on a contingent debt, which was incapable of valuation, either under the 54th, or the 56th, section of the 6 Geo. 4. c. 16. In *Ex parte Marshall* (a) it was decided that where the bankrupt has given an indemnity bond, and the amount of the damage is not ascertained before the fiat issues, there is no debt provable. The *Chief Judge*, in giving his judgment, draws a distinction between contingent liabilities that may never become debts, and contingent debts that may never become payable; and he says, that, upon the fullest consideration of all the reported decisions, he was satisfied that claims under the first class, upon which no debt has arisen till after the bankruptcy, cannot be proved under the 56th section. *Ex parte Thompson* (b), he adds, is an example of the first class, where *A.* having covenanted to pay an annuity on the default of *B.*, and having become bankrupt

(a) 1 Mont. & Ayr. 145; 3 Deac. & C. 120.

(b) Mont. & B. 219; 2 Deac. & C. 126.

before any default, it was held that the annuitant could not prove against *A.*'s estate; as he had not contracted a debt, until the default made, either under the 54th, or 56th, section of the 6 *Geo.* 4. c. 16. In the last mentioned case, *Sir J. Cross* defines what is a *debt*, which he says implies in all cases a sum certain. In *Ex parte Tindall* (a), where the debt was held contingent, upon which a value could be set, there was an absolute covenant of the bankrupt, that his executors should, twelve months after his death, pay the trustees a certain sum, viz. 4000*l.*, upon the trusts of the settlement. In the present case, there is no absolute covenant to pay a sum of money, but merely an obligation to pay an annuity of 150*l.* to trustees, on a certain contingency, namely, in case the bankrupt's wife should survive him. It is uncertain, therefore, whether the obligation entered into by the bankrupt will ever become a debt. It cannot be said, that the 54th section applies to this case; for here there is no *existing* annuity, but merely one to arise on a contingency. The 54th section declares that "*any annuity creditor of any bankrupt*" may prove for the value of such annuity. But here there is no *annuity creditor*; and *non constat*, whether the party will ever become an *annuity creditor*.

*Mr. Dixon, contrò*, relied on *Ex parte Grundy* (b), where *A.* covenanted by his marriage settlement for the payment of 2000*l.*, in case his intended wife, or any issue of the marriage, should survive him; and *A.* having died some years after becoming bankrupt, leaving issue, it was held, that, although the event upon which the debt was contingent had happened after the bank-

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(a) *Mont.* 462.

(b) *Mont. & M.* 293.



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ruptcy, the sum of 2000*l.* was provable under the commission. But *Ex parte Vanheythusen* (a) is decisive of the question ; it was there held, that a contingent annuity granted by the bankrupt to *C. D.*, in case she survived *A. B.*, might be proved before the happening of the contingency, under the 54th section of the 6 *Geo. 4.* c. 16.

Mr. *Ellis*, in reply. The present case is distinguishable from *Ex parte Vanheythusen*, where there was an *existing* annuity of 400*l.*, payable to the father of the bankrupt, and liable to be cut down to 200*l.*, on a certain event, namely, that of the bankrupt's mother surviving his father. But here the bankrupt was merely bound in a penal sum of 3000*l.*, in case his executors did not pay an annuity to his wife, upon the contingency of her surviving him. There is therefore at present no person who is an *annuity creditor*, within the meaning of the 54th section.

Sir JOHN CROSS. I own my first impression during the hearing of this petition was, that this proof could not be sustained. But I wish to read over the report of *Ex parte Vanheythusen*, before I give a final opinion. It is certainly a very nice question.

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Sir JOHN CROSS. I have looked over the report of *Ex parte Vanheythusen*, and it strikes me that that case is decisive of the present question. The petition must therefore be dismissed ; and I cannot avoid directing the petitioner to pay the respondent's costs.

Petition dismissed, with costs.

(a) 1 *Deac.* 360.

Ex parte SAUNDERS.—In the matter of INNES.—

THIS was the petition of a creditor against the official assignee, for the payment of a dividend. It appeared, that when the petitioner applied in the first instance to the official assignee, the latter declined to pay it, unless the petitioner produced a security which he held for the debt; and that on a subsequent occasion the petitioner went to the official assignee, accompanied by his solicitor, between whom and the assignee there had been some previous difference. This gave rise to fresh altercation, and the official assignee refused to pay the dividend. The affidavits in support of the petition had been referred to the registrar for scandal and impertinence; and he found some parts scandalous and others impertinent.

Mr. *Elderton*, in support of the petition, proposed to read those affidavits, which were found only impertinent.

Mr. *Anderdon*, for the official assignee, objected to that course of proceeding. But the chief question is, whether the affidavits, and those passages of the affidavits, which have been found impertinent, are to be allowed in costs. I therefore ask the Court for a special direction in the Order, that the officer shall not, on taxation, allow for the costs of the impertinent matter; because, if that direction is not contained in the Order, the officer will feel bound to allow those costs.

Mr. *Walford*, for one of the creditors' assignees, made imputations against the official assignee of improper conduct in deteriorating the estate.

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*Sergeants' Inn,
March 11.*

An official assignee, though he may decline to pay a creditor his dividend, until he produces the security which he holds for his debt, is not justified in refusing to pay it, on the production of such security.

On a petition for payment of a dividend, it is unnecessary to serve the creditors' assignees with the petition; and if they are served, the petitioner must pay the costs of their appearance.

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 Ex parte  
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Sir JOHN CROSS. If the assignee has any complaint to make against the official assignee, it should be the subject of a distinct petition; but the Court cannot allow these charges to be made by the assignee taking part with a creditor, on a petition for payment of a dividend.

Mr. *Elderton*, in reply, hoped the Court would allow interest on the dividend, which had been withheld from the creditor for a considerable time; and, in support of this claim, he cited *Ex parte Graham* (a). He also urged, that the costs of the appearance of the assignees on this petition should be paid by the official assignee, as his conduct made it necessary to serve them with the petition.

Sir JOHN CROSS. This is a petition of a creditor for the payment of a dividend, to which he is entitled by the Commissioner's order. In the first instance, the official assignee refused to pay it, because the creditor did not produce the security which he held for the payment of the debt. There he was perfectly right. But afterwards, when the petitioner took his security, he also took along with him his attorney, who unfortunately had an old grudge with the official assignee. This excited some angry feeling on the part of the official assignee; high words ensued, and the assignee refused to pay the dividend, either to the petitioner, or his attorney. It has been held by this Court, on a former occasion, in *Ex parte*

(a) 1 Rose, 456. It does not appear, from the report of this case, that Lord *Eldon* ordered the assignees to pay interest on the dividend, although the 49 Geo. 3. c. 121. s. 12., then in operation, enabled him to do so. The 6 Geo. 4. c. 16. s. 111. also authorizes the Court to order the payment of the dividend to the creditor, with interest for the time that it shall have been withheld, and the costs of the application.

*Alexander*(a), that an official assignee is not justified in withholding the payment of a dividend from a creditor, although he might himself have some personal claim against him. The Order must therefore go, as a matter of course, for the payment of the dividend, and the costs of this petition, by the official assignee; but I cannot charge him with interest. With regard to the costs of the other parties, as it was quite unnecessary to serve the creditors' assignees with this petition, the petitioner must pay the costs of their appearance; and the officer will, on the taxation of the costs of this petition, give credit to the official assignee for his costs of the reference for scandal, and of such parts of the affidavits as were found to be scandalous. But the Court gives no special directions as to the taxation of the costs, in regard to those parts of the affidavits which have been found impertinent.

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Ex parte  
SAUNDERS.

(a) 1 Dea. & C. 513.

Ex parte SHARP.—In the matter of CHADWICK  
and another.—

THIS was an application of the petitioning creditor under a joint fiat, that the assignees might be ordered to pay him the costs of obtaining an order for annulling a separate fiat, and establishing the joint fiat. The Order was made on the 23d of November last, with liberty to apply; since which there had been several interlocutory proceedings, namely, a motion by the petitioner for fiat, an Order was made that the assignees should pay him these costs estate, and that they should be taxed as between solicitor and client.

Serjeants' Inn,  
April 19.

Where a separate fiat is ordered to be annulled, in favour of a joint one, and the petitioning creditor under the joint fiat is put to extra costs by the opposition of the assignees in establishing that out of the joint

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Ex parte  
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leave to inspect and take copies of the proceedings under the separate fiat, and another motion to enlarge the time for opening the joint fiat; all of which had been opposed by the assignees. The costs of these motions were incurred by the petitioner, in addition to the taxed costs of the petition to annul the separate fiat.

Mr. *Anderdon*, in support of the motion. The petitioner asks for all the costs which he has incurred in prosecuting the joint fiat, and getting rid of the separate fiat, and that the registrar be instructed to tax such costs, as between solicitor and client.

Mr. *Bacon*. On the motion by the petitioner for liberty to inspect and take copies of the proceedings under the separate fiat, the copies were refused, and the petitioner was ordered to pay the costs of the motion; and no liberty to apply was reserved in the Order made on that occasion. There is no ground, therefore, for asking now for the costs on that occasion. With respect to the costs of the present motion,—the application is made in an improper form, and the petitioner has asked for more than he is entitled to.

Sir JOHN CROSS. This is a question between the petitioning creditor and the assignees, as to the costs of establishing a joint fiat, in preference to a separate one. In effecting this object, the petitioning creditor had difficulties to contend with, which ought not to have been thrown in his way. It seems reasonable, that he should be allowed the costs which he now asks. He has given

the assignees no additional trouble, nor put them to any unnecessary expense; while they have opposed him at every step.

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Ex parte  
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ORDER made as prayed.

Ex parte GARDNER.—In the matter of GARDNER.—

Serjeants' Inn,  
April 19.

MR. BARLOW moved that the bankrupt's certificate should be allowed, although it had only been signed by two Commissioners. The fiat had been worked at Manchester, directed originally to four Commissioners, one of whom had never qualified or acted under the fiat, and had gone to live at Southampton, and one of the three who had acted was dead.

A certificate under a country fiat allowed, although signed by only two Commissioners.

Sir JOHN CROSS. I perceive, that the 122d section of the 6 Geo. 4. c. 16. declares that the certificate shall be no discharge, "unless the Commissioners shall, in writing, under their hands and seals, certify to the Lord Chancellor that such bankrupt has made a full discovery of his estate and effects, &c." It does not say the *major part* of the Commissioners. I think, under the circumstances, it is reasonable that the certificate should be allowed.

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*Serjeants' Inn,*  
*April 22.*

The mortgagee of property, which has been some time untenanted and unproductive, consents that the assignee of the bankrupt mortgagor shall let the premises to such person as he may think proper, the mortgagee stipulating that his consent is not to be considered as assuming the possession of the premises as mortgagee. In pursuance of this arrangement the assignee lets the property, and receives the rents for a period of seven years, when the property is sold, but the proceeds of the sale are not sufficient to pay off the whole of what is due upon the mortgage.

*Held*, that the assignee, and not the mortgagee, was entitled to these bye-gone rents.

Ex parte ROBERT LINDOW CARR.—In the matter of HENRY WILCKENS and JOHN GABRIEL MIGAULT.—

THIS was the petition of the surviving representative of a mortgagee of some property of the bankrupt, praying that the assignee might be ordered to pay over to the petitioner the sum of 800*l.*, in respect of the rents of the mortgaged property alleged to have been received by the assignee.

The bankrupt, *Henry Wilckens*, as one of the executors of *Andrew Fuhrer*, deceased, with the consent of his co-executor, and of *Ann Fuhrer*, the widow of the testator, lent to the other bankrupt, *John Gabriel Migault*, the sum of 1600*l.*, part of the testator's personal estate; to secure the repayment of which, *John Gabriel Migault*, by an indenture, dated 17th December 1800, and made between *John Gabriel Migault* of the first part, *Henry Wilckens* of the second part, and *Ann Fuhrer* of the third part, demised unto *Henry Wilckens* and *Ann Fuhrer* their executors, administrators, and assigns, a piece of land, with the erections and buildings thereon, called the Island Salt Works, at Over, in the county of Chester, to hold for the term of 1000 years, at a nominal rent, and subject to a proviso for redemption on payment of the 1600*l.*, with interest.

On the 19th December 1812, a commission of bankruptcy issued against *Wilckens* and *Migault*.

On the 16th March 1821, *Henry Wilckens* died, leaving *W. Thompson* his executor.

The interest on the mortgage money was duly paid to *Ann Fuhrer* up to the year 1810; but after that time it ceased to be paid.

On the 16th October 1821, *Ann Fuhrer* died, having

appointed *John North* and *Thomas North* her executors, when a large arrear of interest was due to her in respect of her life interest in the mortgage.

After the bankruptcy of *Wilchens* and *Migault*, the salt works continued untenanted up to the year 1826, when they became in a ruinous state; and, adverse claims of title having been set up to them by various parties, they could not be sold to advantage. In this state of things, both the assignees of the bankrupts, and the personal representatives of the testator and of *Ann Fuhrer*, were alike unwilling to incur any risk by taking possession of the salt works; but, for the purpose of coming to some arrangement, a negociation was set on foot as to letting the property; and it was finally agreed, that the assignee should let the property, without prejudice to the rights of any of the parties, and that the rents should be received by the assignee, but be placed by him at a banker's in the joint names of himself and the representatives of the testator and his widow. On the conclusion of this arrangement, a letter was addressed by the representatives to the assignee as follows:

“To Mr. *Harwood Banner*, assignee of the estate and effects of *Henry Wilchens* and *John Gabriel Migault*, bankrupts.

“As you require the consent of the representatives of *Andrew Fuhrer*, deceased, the mortgagee, and also the representatives of *Ann Fuhrer*, deceased, his widow, for your letting the salt works and premises situate at Over, late the property of the said bankrupts, or one of them, we, the undersigned, do hereby consent that you may let the same premises to such person or persons, and for such rent, as you may judge proper, paying the rent when and as received, after deducting the expense of repairs,

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insurance, and all other costs and expenses, into the banking house of Messrs *Leyland and Bullens*, Liverpool, in the joint names of yourself and us, there to remain for the benefit of the party, who may be ultimately found entitled to the same; it being understood, that this our consent is to be evidence only of, and is intended only to signify, our own acquiescence, and not as assuming the possession of the premises as mortgagees, or otherwise, nor as authorizing any interference with the property, so far as affects the rights and interests or claims of any other person whosoever. Dated this 27th day of September 1826.

*William Thompson*, limited executor of *Henry Wilckens*, who was the executor of *Andrew Fuhrer*.

*Thomas North*, } Executors of *Ann Fuhrer*,  
*John North*, } deceased.

In pursuance of the above arrangement, the assignee, on the 1st June 1828, with the concurrence of the executors, let the salt works at a yearly rent of 100*l.*, and they continued to be so let up to the 1st December 1834; from which time up to the 1st July 1835, they were unoccupied; but they were then let to another tenant at the same rent up to the 19th December 1837, when the property was sold. During the continuance of these tenancies, the assignee received the rents; but, instead of paying them into the banker's in the joint names of himself and the executors, he placed them there in his own name; and they amounted now, after all proper deductions, to the sum of 800*l.*

By an Order of the Court of Chancery, dated the 26th November 1836, and made in a cause in which the nephew of *Andrew Fuhrer*, the testator, was plaintiff,

and the executors defendants, the salt works were ordered to be sold, and the proceeds to be applied in payment of the principal money and interest due on the mortgage, and the residue, if any, to be paid to the assignees. In pursuance of this Order, the premises were sold for 3100*l.*, which sum was paid into the Bank of England, to the credit of the Chancery suit. This sum, however, was alleged by the petitioner to be insufficient to pay the money due on the mortgage, which was stated to amount, with the interest, to 4000*l.*

On the 17th November, 1837, *W. Thompson*, the executor of *Henry Wilckens* died, leaving the petitioner and *Harwood Banner*, his executors, who therefore became the legal personal representatives of the testator, *Andrew Fuhrer*.

It appeared that the claim of the executors of *Ann Fuhrer*, the widow, had been satisfied by the payment to them of the balance due to her out of the estate of the testator; so that her executors had no claim to the 800*l.*

The petitioner alleged, that in consequence of *Harwood Banner* being not only one of the personal representatives of the testator, but also the assignee under the bankruptcy, the petitioner was desirous that the sum of 800*l.* might be paid over to him, in order that it might be secured to the testator's personal estate.

*Mr. Bacon*, and *Mr. J. Adams*, in support of the petition. The question is, whether the petitioner in his character of the legal personal representative of the mortgagee is entitled to the bye-gone rents of the mortgaged property. We rely on the agreement of the assignee to pay the rent of the salt works into the banking house of Messrs. *Leylands*, in the joint names of the

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assignee and the executor of the mortgagee. It was a breach of faith on the part of the assignee to pay the rents into the bankers in his own name.

Mr. *Anderdon*. The Statute of Frauds operates against the claim of the petitioner; there being no distinct and express contract that the rents were to be paid to the executors of the mortgagee. The Court will look at the rights of these parties, as if a bill had been filed against the assignee for an account of the rents. The executors of the mortgagee might have applied to the tenants of the property for the rents, and then they would have been mortgagees in possession. We submit, that there has been no acquiescence whatever on the part of the assignee in the title of the mortgagee's executors to these rents.

Mr. *Bacon*, in reply. We must look to the position of affairs at the time of the agreement between these parties. The assignee was not willing to take possession of the mortgaged premises; the mortgagee's executor was also unwilling; it was then stipulated that the assignee should take possession with the consent of the executor, upon condition that the rents should be paid into a certain bank in their joint names. *Banner*, the assignee, must be considered as the agent for both parties; for he stands in a double capacity, as the assignee of the bankrupt, and one of the personal representatives of the mortgagee.

Sir JOHN CROSS. It seems to me, that this document, viz. the letter addressed by the executors to *Banner*, the assignee, bears now a different interpretation from that

which I was at first inclined to put upon it. Let us look at the state of things existing at the time this letter<sup>a</sup> was written. The premises in question had been for more than thirteen years untenanted,—the salt works unworked and unproductive,—and the whole property nothing better than a *damnosa hereditas*. The assignee then says, I will take possession, provided the mortgagee's executor consents; the executor gives that consent, but he takes good care of himself; for he stipulates, that his consent is not intended "as assuming the possession of the premises as mortgagee, or otherwise, nor as authorizing any interference with the property, so far as affects the rights and interests or claims of any other person whomsoever." That stipulation seems to me a complete disclaimer of taking possession of the property in the character of mortgagee; and amounts, in fact, to this—that you, the mortgagor, shall not be considered as the tenant of me, the mortgagee. *Banner*, the assignee, has acted upon the strength of this consent and stipulation; and has received the rents, as it was agreed, for the benefit of the party who might be ultimately found entitled to the same. I am now, therefore, called upon to decide, who is the party entitled to these rents; and I am of opinion, that the assignee, having taken possession of the property in his character of assignee, is the party entitled to the rents, and not the executor of the mortgagee.

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The ORDER declared the rents to form part of the estate and effects of the bankrupt, and dismissed the petition, but without costs; the costs of both parties to be paid out of the estate.

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Serjeants' Inn,  
April 23.

Ex parte JAMES STUART.—In the matter of —  
STUART.—

On a petition that the property on which an annuity is charged should be sold, for the payment of the value of the annuity, the Court will refer it to the Commissioners to ascertain, in the first instance, whether the petitioner has a valid security on the premises on which the annuity is alleged to be charged.

THIS was the petition of a party claiming to be an annuity creditor of the bankrupt, and praying that the property on which it was charged might be sold for the payment of the value of the annuity.

Mr. *Montagu*, in support of the petition. I should have thought that, under Lord *Loughborough's* General Order (a), the Commissioners could have ordered the sale of this property, without an application to this Court; but I find that, according to the decision in the matter of *Delves* (b), an application to this Court is necessary, in the first instance.

Mr. *G. A. Young, contrà*. The petitioner has offered no evidence of any deed, bond, or other instrument, by which the alleged annuity is secured. As the 6 *Geo. 4. c. 16. s. 54.* expressly enables the Commissioners to ascertain the value of the annuity, the assignees are therefore desirous that the Commissioners should look into the securities held by the petitioner, and decide whether he is now an annuity creditor, within the meaning of the act of parliament.

Sir JOHN CROSS. Upon a reference to the case of *Ex parte Pocock*, in the matter of *Yates*, which occurred on the 16th June 1827, and a note of which has been furnished me by Mr. *Barber*, I find that the Lord Chancellor, upon a similar petition, ordered that the Commissioners should first inquire, whether the petitioner

(a) 8 March 1794. See 2 Deac. B. L. 89.

(b) 1 Mont. 492.

was an annuity creditor, and then that they should value the annuity (a). I therefore think that the same Order should be made on the present occasion.

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(a) The words of the Order made by Lord Eldon in the case referred to are, "that it should be referred to the Commissioners to inquire and ascertain whether the petitioner has a valid security upon the premises mentioned in the indenture set forth in the petition, in respect of the annuity; and if the Commissioners shall find that the petitioner has a valid security upon the premises in respect of the annuity, then I order that the Commissioners shall ascertain the value of the annuity at the date of the commission, regard being had to the original price given for the annuity, deducting therefrom such diminution in the value thereof, as shall have been caused by the lapse of time since the grant thereof to the date of the commission;" and the Commissioners were also to take an account of the arrears of the annuity (if any) which became due up to the last day before the date of the commission on which the same was payable, and remaining unpaid at the date thereof, and of the advances and payments made by the petitioner, as in the petition alleged, and also of the rents and profits of the premises (if any) received by the petitioners, or by any other person by their order, or for their use:—and then ordering the examination of all proper parties by the commissioners—and that the premises should be sold, and the sale be conducted by the assignees, with liberty for petitioner to bid, and the proceeds to be applied in part discharging of what should be found due, with liberty to prove for the residue.

Ex parte GURNEY and others.—In the matter of GLASSCOTT and another.—

THIS was the petition of creditors claiming to prove against the joint estate.

The two bankrupts, in partnership with their brother, carried on business under the firm of "*Glasscott and brothers.*" On the 30th October 1840, this partnership was dissolved by the retirement of one of the brothers, when an assignment was executed by the retiring to the

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May 5.

A. B. and C. dissolve their partnership, when C. executes a regular assignment of the partnership effects to A. and B., and notice of the dissolution appears in the Gazette. A. and B. continue the business in

the same firm until their bankruptcy, which is more than a twelvemonth after the dissolution and assignment. Held, that a joint creditor of A., B. and C. could not prove against the estate of A. and B.

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continuing partners of all his share in the partnership stock and effects, and notice of the dissolution of the partnership was advertized in the Gazette; but there was no specific notice given to the petitioners. The two continuing partners carried on the business under the same firm, until the issuing of the fiat on the 2d November 1841. The Commissioners rejected the proof, on the ground that the petitioners were creditors of the three, and not of the two; but were desirous that the question should be brought before the Court of Review.

Mr. *Anderdon*, in support of the petition. The present case is very like that of *Ex parte Cooper*, in the matter of *Johnston (a)*, where *A.* and *B.* agreed to dissolve their partnership from a particular day, and published a notice to that effect in the Gazette, stating that the debts due to and by the firm would be received and paid by *A.*; no assignment was executed of the partnership effects, but they were left in the possession of *A.*, who continued to carry on the business of the partnership firm for four months, until the issuing of the joint fiat; and it was held, that the partnership property was not convertible into the separate property of *A.*, but was distributable among the joint creditors of *A.* and *B.* The only difference between that case and the present is, that here there was an assignment of the partnership effects to the continuing partners. The claim of the petitioners is not put on the ground of strictly legal claim on a debt contracted by the two, but of there being specific assets at the time of the dissolution of the partnership, which were then available for

(a) 1 Mont. Deac. & D. 358.

the payment of the petitioner's debt; and that there has been no transmutation of the possession of those assets. There is also in the assignment from the retiring partner a covenant on the part of the two to pay the debt of the three—this, it is submitted, raises an equity against the two. The petitioners acknowledge that there was notice of the dissolution of the partnership in the Gazette; but they say, that they never knew of it. There ought to have been a specific notice given to the petitioners, as the firm continued precisely the same. The firm, therefore, continuing without any change, and the possession without any transfer, the Court will make the assets of the three available to the debts of the three.

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and others.

Mr. *Craig*, for the assignees, was stopped by the Court.

Sir JOHN CROSS. The partnership of the three was dissolved so long ago as the 30th October 1840, when there was a regular assignment of the partnership effects, from the retiring to the continuing partners. That circumstance distinguishes this case from *Ex parte Cooper* (a), as well as another important fact, that the assignment was more than a twelvemonth before the bankruptcy. As it appears that the Commissioners adjourned the question, in order that the petitioners might take the opinion of this Court, it would be hard to make them pay the costs of the assignees.

Petition dismissed, without costs.

(a) 1 Mont. Deac. & D. 358.





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*Serjeants' Inn  
Hall.*

May 5, 6 &amp; 30.

One of three partners deposits with a joint creditor a bond belonging to himself, to secure the partnership debt: *Held*, on the bankruptcy of the partners, that the creditor could prove the amount of his debt against the joint estate, without giving up the bond.

The memorandum of deposit stated that a policy of assurance on the life of the obligor was also deposited with the bond; but this was not the fact, and the policy was found in the bankrupts' chest at the time of their bankruptcy: *Held*, that the policy passed to the assignees.

The obligor had also given two of the bankrupts a warrant of attorney to secure the payment of the bond; but the warrant of attorney was neither specified

in the memorandum of deposit, nor mentioned to the creditor when the bond was deposited. Upon this warrant of attorney the assignees having entered up judgment, the Court ordered that they should be restrained from further proceeding on it.

A letter from the bankrupt to a creditor, saying, "that he had resolved not to open his bank on Monday," does not amount to notice of an act of bankruptcy, within the meaning of the 2 & 3 Vict. c. 29, but is only notice of an intention to commit an act of bankruptcy.

*Ex parte* THOMAS HALLIFAX and others.—In the matter of WILLIAM RIDGE, CHARLES RIDGE, and WILLIAM NEWLAND.—

THIS was a petition for the proof of a debt, without being compelled to deliver up certain securities held by the petitioners.

The bankrupts were bankers at Chichester, their banking-house being called "The Chichester old Bank," and the petitioners were bankers in London, trading under the firm of *Glyn, Halifax, Mills & Co.* Prior to the year 1825, the partners in the Chichester bank were *Charles Ridge*, one of the bankrupts, and *William Ridge*, sen., and *Richard Murray*. In 1826, *Richard Murray* died, when *William Ridge*, jun., the bankrupt, became a partner. In 1829, *William Ridge*, sen., died; and in April, 1830, *Benjamin Ridge* was admitted a partner, and in November 1830, the bankrupt, *William Newland*. In 1833 *Benjamin Ridge* retired, from which time the three bankrupts carried on the business down to the period of the bankruptcy.

The petitioners were the London correspondents of the Chichester bank, and were frequently in advance for the bank to a considerable amount. On the 23d September 1841, the petitioners advanced 6000*l.*, and on the 30th October 1841, a further sum of 8000*l.* To induce the petitioners to advance this last sum, *Charles Ridge* produced a bond of one *William Padwick*, dated 16th August 1825, for securing to *William Ridge*, sen.,

deceased, *Richard Murray*, deceased, and the bankrupt, *Charles Ridge*, the sum of 5000*l.*, and he also offered a policy of assurance for 5000*l.*, which had been effected by *William Padwick* on his life, as a collateral security for the bond, and various promissory notes of third parties, which, with the sum of 5000*l.*, amounted to 19,110*l.*; and it was ultimately agreed, that the bond, policy, and notes should not only be a security for the 8000*l.*, but also for the 6000*l.*, and the balance of the running account. A memorandum of deposit, dated the 30th October 1841, was then delivered to the petitioners, which, after setting forth a list of all the above-mentioned securities, contained at the foot the following memorandum in the hand-writing of *Charles Ridge*.

"The securities herein-named left with Messrs. *Glynn, Halifax & Co.*, for 19,110*l.*, to cover the general account of *Ridge & Co.*, Chichester old Bank." The bond and policy of assurance were thus described:— "*William Padwick*, Esq., bond, policy of insurance, 5000*l.*" The fact was, however, that the policy of insurance was not then delivered to the petitioners, but *Charles Ridge* promised to send the policy; on the faith of which promise, and the securities actually delivered, the petitioners alleged that they advanced the 8000*l.*, and made also subsequent advances to a large amount. The policy of insurance was never given up by the bankrupts, and was at their bankruptcy taken possession of by the assignees. It appeared, also, that the bond had been assigned by the other obligees, or their representatives, to *Charles Ridge*, together with the policy of assurance, as a collateral security for the bond; but the indenture of assignment was not deposited with the petitioners. At the date of the fiat, the bankrupts were in-

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debted to the petitioners in 14,739*l.* as the balance of their general account, which was afterwards reduced, by various sums received on the promissory notes, to 10,698*l.* On the 16th February 1842, the petitioners applied to prove for this last-mentioned sum against the joint estate of the three bankrupts; but the proof was opposed by the assignees, on the ground that no account had been forwarded by the petitioners to the assignees, showing how the amount claimed arose; and also that the petitioners were not entitled to prove any debt against the estate of the bankrupts, without giving up the bond, and all claim to the policy of insurance; and on these grounds the Commissioners rejected the proof. On the 19th February the petitioners produced before the Commissioners a debtor and creditor account, showing how that balance arose; but they still on the other ground refused to admit the proof.

On the 26th November 1841, the fiat issued.

It appeared, that *William Padwick* had on the 27th April 1832 given the bankrupts, *William Ridge* and *Charles Ridge*, a warrant of attorney to secure the payment of the bond for 5000*l.*; which warrant of attorney the assignees retained the possession of, and had entered up judgment thereon with a view to take out execution against *Padwick*.

The petition alleged, that several parties liable on the promissory notes were unable to pay them, and that in some instances time had been required for that purpose; and that in one case, in which a composition of 6*s.* 8*d.* in the pound had been offered, the assignees refused to sanction the petitioners receiving the composition, without prejudice to their right to prove the full amount of their balances.

The prayer was, that the petitioners might be admitted to prove for the 10,698*l.*, without giving up the bond; and that the assignees might be ordered to deliver to the petitioners the policy of insurance effected on the life of *William Padwick*, and might be restrained from issuing execution upon the judgment entered up on the warrant of attorney.

The affidavits in support of the petition stated, that when the last advance of 8000*l.* was made by the petitioners at the request of the bankrupt, *Charles Ridge*, he expressly agreed that the notes, bond, and policy of assurance should be securities for the 8000*l.*, as well as the balance of the running account, and that he then stated that he had omitted to bring with him the policy, but that he would afterwards deposit it with the petitioners, as well as the bond.

In answer to the allegations in the petition, the defence set up by the assignees was, that they were entitled to the debt secured by *Padwick's* bond, as being in the order and disposition of the bankrupts at the time of their bankruptcy, no notice having been given to *Padwick* of any assignment or deposit of the bond, previously to the 16th November 1841, which was after the act of bankruptcy. The assignees also claimed to be entitled to the full benefit of the judgment on the warrant of attorney. And with respect to the policy of assurance, the assignees stated that this was found in the banking house of the bankrupts, together with an assignment of it to them, and other documents deposited with them by *Padwick*, and that on none of these instruments was there any memorandum showing that any other person than the bankrupts had any interest therein. That no notice was given before the bankruptcy to the insurance

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office of any deposit of, or agreement to deposit, the policy; and that, for the purpose of keeping the policy on foot, the assignees had paid one year's premium at the office, amounting to 169*l.* 15*s.* 10*d.*, out of the funds in their hands. It appeared that the act of bankruptcy was committed on the 15th November, and that on the 14th November the bankrupts wrote to the petitioners to inform them that they had resolved not to open their bank on the 15th November.

Mr. *Anderdon*, and Mr. *Keene*, in support of the petition. When the petitioners applied to prove for the balance due to them, it was objected that they could not prove, until the promissory notes deposited with the petitioners were realized. Now, in all these cases, the question is, as was decided in *Ex parte Phillips* (a), whether the notes were indorsed by the party depositing them, or whether they were deposited as mere chattels to secure the payment of the debt. In the present case the notes were indorsed by the bankrupts. [Sir *J. Cross*. As to the notes, I think you are entitled to prove for the whole amount of them.]

As only one of the bankrupts, *William Ridge*, was an obligee in the bond, he having survived the two other obligees,—and the two bankrupts, *Charles Ridge* and *William Newland*, are not in any way affected by it,—the petitioners have a right to prove their debt against the joint estate, without giving up the bond, which can only be a security against the separate estate of the bankrupt, *William Ridge*. The present case is precisely within the principle laid down by the present Lord Chancellor in *Ex parte Shepherd*, in the matter of

(a) 1 Mont. Deac. & D. 232.

*Plummer*(a), where two partners covenanted, jointly and severally, for the payment of a mortgage debt owing by the partnership firm, and it was held that the mortgagee might prove the whole debt against each separate estate, without giving up his security.

But it is to be contended by the other side, that the petitioners gave no notice to the obligor of the transfer of the bond, so as to take the case out of the operation of the 72nd section of the Bankrupt Act(b), as to reputed ownership. It may be a question, whether the petitioners were bound to give such notice; for, in *Ex parte Newton*(c), it was determined, that where a bankrupt had deposited an assignment which had been made to him of a reversionary interest under a will, although no notice of the deposit had been given to the executors, the property was not within the order and disposition of the bankrupt, as reputed owner; the Chief Judge there saying, that the cases had already gone far enough, as to the doctrine of reputed ownership, where notice is omitted to be given of the assignment of a *chose in action*. And in *Gardner v. Lachlan*(d), where a bankrupt had assigned the freight becoming due to him under the charter-party of a ship that belonged to him, and gave notice to the party to whom the freight by the charter-party was made payable; this was held sufficient to take the debt out of the order and disposition of the bankrupt, without giving notice to the party by whom the freight was to be paid. But it is in evidence here, that the petitioners gave such notice before the date of the fiat; and that is now sufficient, under the provisions of the recent act of parliament(e).

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(a) 2 Mont. Dea. &amp; D. 204.

(b) 6 Geo. 4. c. 16.

(c) 4 Dea. &amp; C. 138.

(d) 4 Myl. &amp; C. 129; 6 Sym. 407;

8 Sim. 123.

(e) 2 &amp; 3 Vict. c. 29.

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It is, however, objected, that the petitioners had notice of *Ridge & Co.* having committed an act of bankruptcy, before they gave notice to the obligor of the bond, and therefore that they cannot avail themselves of such last-mentioned notice. The notice, on which the assignees rely, is contained in a letter written by the bankrupts to the petitioners on the 14th November 1841, in which they inform them that "they had resolved not to open their bank on Monday," which would be the 16th November. But this letter amounts to nothing more than a declaration of the intention of the bankers to stop payment; and it was held by Lord *Tenterden*, in *Tucker v. Barrow* (a), that mere notice of insolvency is not sufficient to invalidate dealings or transactions *bonâ fide* made with the bankrupt, though on the verge of bankruptcy.

With respect to the policy of assurance on the life of *W. Padwick*, the obligor of the bond, we admit that it was not delivered up with the other securities to the petitioners; but that is no objection to the lien of the petitioners. The memorandum of deposit says, that the policy was left with the petitioners, along with the other securities therein named, to secure the general account of the bankrupts with the petitioners; this shows the intention of the parties to create a pledge of the policy, although it was not actually deposited. The policy was effected by *Padwick*, as a collateral security for the bond, and there was a positive contract by the bankrupts to deposit it along with the bond. Does the mere accidental non-delivery of it, therefore, by the party pledging it enable him afterwards to deal with it? Where it is clear that there is an intention to create a lien by the memorandum of deposit, it is as good in

(a) 3 Car. & P. 85; 1 Mood. & Malk. 141.

equity as an assignment of the thing itself(a). Thus, where one of several *cestui que trusts* promised, by letter, that, as soon as a partition could be effected of the trust estate, he would give his bankers a security for the full amount of the account; and some time afterwards, the partition having taken place, he signed a memorandum, stating, that he had deposited the deeds therein described, but the partition deed was not deposited; this Court held, that the bankers were not the less equitable mortgagees of the estate taken in partition; *Ex parte Farley* (b). Again, in *Ex parte Chippendale* (c), where the bankrupts deposited only one of their title deeds, which was the principal conveyance of the property, with the petitioners, as a security for a debt, leaving the other deeds in the hands of their own solicitors; it was held that this also was a good equitable mortgage. The Court there said, "The question is, whether what was done in this case is not evidence of an agreement, on the part of the bankrupts, to give the petitioners a mortgage on their estate; and there is nothing here to counteract the intention of the parties to do so, an intention which is sufficiently apparent by the deposit of the principal conveyance with the petitioners." The principle there laid down is, not that all the title deeds must be delivered, but that the principal deed is sufficient. So here, the policy in question is only an incident in the title, it being merely a collateral security for the bond. [Sir John Cross. All your title to the policy is, a promise to depo-

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(a) In *Wetherell's case*, 11 Ves. 401, Lord Eldon said, it had never been decided how far it was necessary to deliver all the title-deeds to constitute an equitable mortgage, or whether that would not be taken to be a sufficient deposit, which could be taken to amount to evidence that the estate was meant to be a security.

(b) 1 Mont. Deac. & D. 683.

(c) 1 Deac. 67.



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sit what has never been deposited. Suppose the agreement had been to deposit goods, which had been left in the possession of the bankrupt?] They would, no doubt, belong to the assignees; but there is a difference between goods and chattels, and a *chose in action*. In *Ex parte Chippendale*, evidence of the intent was held to be sufficient, without an actual deposit of all the documents. [Sir *John Cross*. In that case the principal conveyance relating to the estate was deposited; and the other deeds related to the same estate. Here the memorandum states, that the policy was left with the petitioners; which was not the fact. You rely on an *ex post facto* promise to deposit what ought to have been previously deposited. Is there any case, which decides that a party may have a lien on a thing not delivered into his possession?] A thing may be appropriated by contract, as goods for the payment of a bill of exchange.

Another question remains to be considered. The petitioners were wrongfully displaced from their right of proof in February last. They should therefore be placed in as good a situation as they would have been in then, if admitted to prove. It has been decided in equity, that where the obligee of a bond is kept out of the receipt of his principal by the acts of the obligor, he is entitled to interest beyond the penalty of the bond. And in the case of the *Bank of Scotland* (a), where subsequent payments had been made to a petitioner, after the rejection of his proof by the Commissioners, and pending a petition against their decision, it was held by Lord *Eldon*, that these subsequent payments were not to prevent the petitioner from receiving dividends on the

(a) 19 Ves. 310.

amount which he had a right to prove, when his proof was rejected.

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Mr. *Dixon*, for the assignees. The petitioners had notice of the act of bankruptcy, before they gave any notice to the obligor of the bond that the bankrupts had deposited the bond with them. It was sworn, that, on the 14th November, the bankrupts wrote to the petitioners, saying, that they were compelled to suspend their payments, and that they had resolved to shut up the bank on the 15th. This accordingly took place in the early part of that day; the doors of the bank were closed, when they ought to have been opened as usual for business, and persons who came to receive cheques were obliged to return with them unpaid. It cannot be denied, that this, according to the decision in *Cumming v. Bailey* (a), amounts to an act of bankruptcy. The letter of the 14th November, containing this information, the petitioners must have received, by due course of post, on the morning of the 15th; and it was not until that day that they wrote to *Padwick*, the obligor of the bond, informing him that they had for some time been the holders of the bond. This letter was received on the 16th. Now before this letter was either received or written, the petitioners were acquainted with the fact of the bank being closed; and it is also sworn, that they were told that a docket had been or would be struck on the 15th; and the petitioners have not ventured to deny this affidavit.

As to the non-deposit of the policy of assurance: — there were four securities for the same debt: the bond, the policy, the warrant of attorney, and the assignment. [Not one of these securities was deposited,

(a) 6 Bing. 363.

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except the bond. The assignees found the policy in the bankrupt's chest, and have continued to pay the premiums on it at the insurance office, up to this time. Supposing there had been a mortgage of real property, and a bond for the same debt, and the bond had only been deposited with the petitioner, could it be contended that he would have been entitled to the mortgage money? [Sir John Cross. Supposing a bill in equity had been filed for the specific performance of the agreement to deposit the policy, would not the Court of Chancery order the performance of the agreement?] It has been held, that a mere parol agreement does not constitute an equitable mortgage; *Ex parte Coombe* (a). [Sir John Cross. The Statute of Frauds says, certainly, that no interest in *lands* shall pass, except by agreement in *writing*.]

Mr. *Anderdon*, in reply. The objection now made, that the petitioners had notice of the act of bankruptcy before they gave notice to the obligor of the deposit of the bond, is quite an afterthought; for it was never made before the Commissioner. The decision, too, in *Cumming v. Baily* (b), which has been relied on by the other side, is quite opposed to that of the King's Bench, in *Mills v. Bennett* (c). But, whether the shutting up the banking-house is an act of bankruptcy, or not, how can it be contended that a notice of an intention to commit an act of bankruptcy is an act of bankruptcy in itself? Here, therefore, as the petitioners gave notice of the deposit of the bond, before the issuing of the fiat,

(a) 4 Madd. 249.

(b) 6 Bing. 363.

(c) 2 M. & S. 556. This case merely decided, that the shutting up of a banking house by *one* of three partners, who resided on the spot, the other two residing at a distance, and not knowing of what was done, was not evidence of a joint act of bankruptcy by *all three*.

without having had notice of any prior act of bankruptcy, they had completed their title as equitable mortgagees, within the meaning of the 2 & 3 Vict. c. 29. [Sir John Cross. That act declares, "that all contracts, dealings, and transactions, by and with any bankrupt," shall be valid, if really and *bonâ fide* made and entered into before the issuing of the fiat. I do not exactly see, how the serving of a notice in this case on the obligor of a bond amounts to a *dealing, or transaction*, with the bankrupt.] As to the case put of depositing a bond, without the mortgage deed for the same debt, the depositary of the bond could not, in that case, recover the mortgage money, because the mortgage deed was the principal security, and the bond only incidental. So here, the bond is the principal security, and the policy only incidental. The facts of the present case are entirely within the principle laid down by this Court in *Ex parte Chippendale*(a). And as to the non-delivery of the warrant of attorney, the petitioners never knew of the existence of such an instrument. It cannot, therefore, be said to have been left in the possession of the bankrupts with the consent of the petitioners.

*Cur. adv. vult.*

Sir JOHN CROSS. The bankrupts in this case were bankers in Sussex, and the petitioners were the London bankers, with whom they kept their account; and on the 30th October last, the bankrupts, being then indebted to the petitioners to the amount of 6000*l.*, applied to them for further advances to the amount of 8000*l.* more, upon the deposit of various securities, and among these was a bond of one *Padwick*, for the payment of 5000*l.*, to two of the bankrupts. The 8000*l.* was accordingly advanced,

(a) 1 Mont. Deac. & D. 683.

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and the partner, by whom the transaction was negotiated, *promised* at the same time to deposit also with the petitioners a policy of insurance on the life of *Padwick*, which the latter had previously deposited with the bankrupts, as a collateral security for the bond. But the policy was not delivered to the petitioners, and it has since come into the hands of the assignees.

The fiat bears date on the 26th November last.

The petitioners have tendered a proof of their debt to the Commissioners, to the amount of 10,000*l.* and upwards, being the balance of their account due from the bankrupts. It was rejected by the Commissioners, unless the petitioners would deliver up the bond, and relinquish their claim upon the policy of insurance.

And it further appears, that, long before the bond was left with the petitioners, the obligor had given the bankrupts a warrant of attorney to enter up judgment for the bond and debt, and they retained this warrant in their own hands till the bankruptcy, and the assignees have since entered up judgment thereon. The bond was the separate property of one of the three bankrupts, and was deposited as such; and the petitioners therefore claimed a right to prove their debt against the three, and retain the bond as a collateral security.

The petitioners have accordingly come to this Court, and applied for liberty to prove their debt, and to retain the bond and also for an injunction to restrain the assignees from taking any further proceedings upon the judgment, and for an Order upon them to deliver up the policy of insurance to the petitioners. The assignees contend, that the petitioners are not entitled to the bond, because, although they had given notice of their lien to *Padwick*, the obligor, before the date of the fiat, it was not till

after they had received notice of a prior act of bankruptcy. But the only evidence relied upon, in proof of such notice of a prior act of bankruptcy, is a letter received by the petitioners from one of the bankrupts, in which he expressed himself in these terms: "*We have resolved not to open our bank on Monday.*" But I am of opinion that this is not "*notice of any prior act by them committed,*" within the meaning of the statute for the protection of parties dealing with bankrupts. It is notice of a future intention only. And, upon the whole, I think the petitioners are entitled to prove their debt, without delivering up the bond; and that the assignees must be restrained from proceeding upon the judgment, except in aid of the petitioners; but that the petitioners are not entitled to the policy of insurance, as it never came into their possession.

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Ex parte GEORGE HILL, and others.—In the matter of  
HENRY CLIFTON.—

THIS was a petition of several creditors to annul the fiat, on the ground of the bankrupt not being a trader, within the bankrupt laws.

The fiat issued on the 20th July 1841, in which the bankrupt was described as "of Bath Lodge, in the city of Worcester, *proctor*, dealer and chapman," and under which he had passed his last examination, and obtained his certificate.

It appeared that the bankrupt had for many years, prior to 1841, carried on the business of a proctor at Worcester, and at the same time held the office of secretary to the Lord Bishop of the diocese; and that, upon

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Where a creditor petitioned to annul a fiat, eight months after it had been issued, on the ground that the bankrupt was not a trader; and a final dividend had been made, and the bankrupt had obtained his certificate, and no cause was assigned for the delay; the petition was dismissed with costs.

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his ceasing to hold that office, he made an assignment of his effects to *John Tymbs*, for the benefit of his creditors.

The petitioners alleged, that they had lately discovered that the act of trading, upon which the bankruptcy was adjudged, was that of a *picture dealer*; but that the bankrupt never bought or sold pictures, or any other articles, with a view to gain his livelihood; that he never gave himself out to the world as a dealer in pictures, or as a trader in any way, or kept any shop or place for the sale or exhibition of pictures or other articles; and that he was never considered, at Worcester, as a dealer in pictures, or as engaged in any other species of trade. That the assignment of his effects was prepared under the advice of the same solicitors who issued the fiat, and who were also employed by the bankrupt in procuring his certificate; that the solicitors, as well as the petitioning creditor, who was afterwards chosen assignee, were intimate friends of the bankrupt; and that the fiat was a friendly fiat, and was issued at the instance of the bankrupt, for his own views and purposes, and not for the benefit of his general creditors.

In answer to the allegations of the petition, the assignee, and one of the solicitors to the fiat, swore, that the bankrupt was in the frequent habit of buying and selling pictures, and was well known to deal in them, although he kept no shop for that purpose. They denied that they were, either of them, intimate friends of the bankrupt. The solicitor stated, that the bankrupt, on the 16th June 1841, sent for and consulted him as to the best mode of satisfying his creditors, and relieving himself from his embarrassments; and that neither the solicitor, nor any of his partners, were ever before employed by the bankrupt, or had ever entered his house, but had

merely a general and ordinary acquaintance with him. That the solicitor, finding that there was an execution in the bankrupt's house, and that four several actions had been commenced against him by other creditors, recommended him to provide for the equal distribution of his property amongst his creditors, by an assignment for their benefit. That, before any one could be prevailed on to act as trustee, another execution was levied on the bankrupt's goods; whereupon the deponent, in order to protect the property of the bankrupt, caused an assignment to be prepared, on the 17th June 1841, in the usual form, to one of the deponent's partners, as a trustee. That, immediately after the execution of the assignment, the deponent caused a sale of the effects of the bankrupt to be advertised publicly in all the Worcester newspapers, as well as by private handbills. That he also called personally upon nearly all the bankrupt's creditors residing at Worcester, including the petitioners, and informed them of the assignment, and wrote to the other creditors for the same purpose. That many of the creditors expressed their readiness to come in under the assignment, but those who had commenced actions refused. That on the 19th July, the bankrupt was taken severely ill, and the deponent had no communication with him until the 4th August; and that, under all the circumstances, the deponent believed that if some decisive step was not taken for securing the equal distribution of the property, the creditors, who had brought actions against the bankrupt, would obtain an unfair preference over the general creditors; and that he mentioned his apprehensions to *J. Parker*, who consented to become petitioning creditor and issue a fiat, to prevent the whole property from being swept away by executions. That at the first public meeting, on the 23d August 1842,

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debts to the amount of 1482*l.* were proved by twelve creditors; at the second public meeting, further debts to the amount of 449*l.* were proved by sixteen creditors; and that at the next meeting, which was in December 1841, a first and final dividend of 2*s.* 8*d.* in the pound was declared, when debts to the amount of 117*l.* were proved by thirty-nine different creditors, making a total amount of debts proved 3126*l.* 16*s.* 10*d.*, by sixty-seven creditors. That no other creditors, besides the petitioners, had omitted to prove under the fiat, except a few of small amount, whose debts did not exceed 150*l.* That two of the petitioners attended at one of the public meetings under the fiat, and were cognizant of the proceedings, and that they well knew that the bankrupt had been declared a bankrupt, in respect of his trading as a dealer in pictures. That one of the petitioners expressed to the deponent his readiness to take 10*s.* in the pound on the amount of his debt; but the deponent refused to hold out any expectation to him of a preference over the other creditors, it being well known that a dividend of 10*s.* in the pound could not be paid to the whole of the creditors. The deponents denied that the fiat was a friendly one, or issued at the instance of the bankrupt; but that, on the contrary, the bankrupt had no knowledge whatever of its being issued, until more than a week after it was sued out.

Mr. *Anderdon*, and Mr. *Keene*, in support of the petition.

Mr. *Hallett*, *contra*, objected that the bankrupt had obtained his certificate; and where that is the case, and a creditor afterwards petitions to annul the fiat, there

must be a distinct allegation of fraud against the bankrupt in the petition; *Ex parte Wyatt*(a). The only allegation against the bankrupt in this petition is, that the fiat was issued at his instance for his own views and purposes; but that does not prove fraud.

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Sir JOHN CROSS.—I know of no law that restricts the Court from hearing such a petition as this, unless there is an express allegation of fraud concocted by the bankrupt. But why did not these petitioners come sooner to the Court, if they were desirous to annul the fiat.

Mr. *Anderdon*. If there is a case of gross delinquency made out against the bankrupt, he cannot take advantage of any lapse of time, when a creditor applies to supersede. We do not deny the fact, that the petitioners might be waiting to see what they could get under the fiat, and that they could, if they had chosen, have applied sooner to annul it. But mere lapse of time will not cure a thing which is manifestly bad and founded in fraud. When the Court has refused to annul a fiat, where ten months had elapsed before the petitioner applied, that was on the ground of concert between the petitioner and the bankrupt. Here there is nothing of the kind; and we do, in effect, allege fraud on the part of the bankrupt, and say that his estate ought never to have been administered in bankruptcy. As to the final dividend of 2s. 8d. in the pound, which is alleged to have been declared,—there have been only three public meetings under the fiat, and at the last of these the dividend was declared. The creditors who have received this dividend may apply it *pro tanto* in discharge of their debts; or they may, if

(a) 3 Deac. & C. 665.

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they think proper, give the bankrupt a release. It is sworn on the other side, that the petitioners knew that the bankrupt was declared a bankrupt as a picture dealer; but the knowledge of the petitioners is immaterial, if the fact is, that the bankrupt was never a picture-dealer. How has the delay of the petitioners served to prejudice any other party? This is a very different case from that, where another creditor has been prevented by the delay from issuing another fiat. [Sir *John Cross*. Is there any instance of a commission or fiat being superseded or annulled upon the petition of a creditor, after the bankrupt has obtained his certificate, and after a final dividend?] It is laid down in *Cooke's Bankrupt Law*, p. 494, that a commission may be superseded on the ground of fraud after a bankrupt has obtained his certificate, although a period of five years has elapsed(a). The Court will perceive that this is not one of those cases, where the mere act of bankruptcy is impeached, and some other may be set up,—or where the petitioning creditor's debt is disputed, and some other may be substituted. But here we say, that there is no trading at all, and that the fiat is radically bad. There is no case in which the Court has ever said, that a lapse of eight or ten months will be a bar to a petition to annul a fiat, which is illegal on the ground that the bankrupt was not a trader. If the other side could prove that the fiat could be supported on other grounds, if they could establish any other species of trading, the case might be different; but nothing of this kind is even attempted.

Mr. *Hallett*, and Mr. *Wood*, *contrà*, were stoped by the Court.

(a) And see *Ex parte Moule*, 14 Ves. 602; *Ex parte Poole*, 2 Cox, 227; *Ex parte Cutten*, Buck, 68.

Sir JOHN CROSS.—It is well understood in this Court, that the annulling of a fiat is a matter purely for the discretion of the Court. Now what are the facts on which this application is grounded. The fiat issued on the 20th of July in last year, and the Commissioners duly found the party a trader, and adjudged him to be a bankrupt. The petitioners acquiesced, and took no steps whatever to dispute the bankruptcy, until the presentation of this petition. During all this time the fiat has been regularly worked, the proceedings under it have been going on, a final dividend has been declared, and the bankrupt has obtained his certificate. These petitioners have suffered the fiat to be executed until its ultimate objects are attained,—they lie by until every thing is completed, until all the bankrupt's effects have been distributed amongst his creditors, and he has no funds whatever to satisfy the remainder of his debts. Public notice is given of the bankrupt applying for his certificate, and the petitioners never stir one step to prevent its being allowed. From the beginning to the end of working this fiat, nothing has been done in which the petitioners have not tacitly acquiesced. The Court therefore is bound to dismiss this petition.—With respect to the costs, the Court is unwilling to impose this burthen on the petitioners; but it cannot help observing that there are two allegations contained in this petition which have not been proved, namely, that the fiat was issued for the bankrupt's own views and purposes, and not for the benefit of his general creditors. Now it is sworn, that the bankrupt had no knowledge of the fiat being issued, until more than a week after it was sued out; and that all the creditors, with the exception of the petitioners and some few to a very small amount, have

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availed themselves of the fiat, received a final dividend on their debts, and given the bankrupt his certificate. The question is, therefore, whether the bankrupt and the assignees ought not to be exonerated from the payment of costs. The petitioners have brought them here to defend their conduct, and must abide the consequence.

Petition dismissed with costs.

Ex parte DONALD MACLEAN.—In the matter of SAMUEL EVANS.—

Serjeants' Inn,
May 7.

The bankrupt undertook to supply a creditor, who was under pecuniary engagements for him, with five pieces of cloth per week, or "to forfeit and pay 10*l.* per piece, as liquidated penalty for every piece deficient." The bankrupt made such frequent default in the regular supply of the cloth, that he incurred penalties to the amount of 3870*l.*, which the creditor claimed to prove, although no specific damage was alleged to have been sustained by him by the non-performance

THIS was the petition of a creditor, claiming to prove under the fiat for the sum of 3870*l.*

The bankrupt was a cloth manufacturer at Frome Selwood in Somersetshire, and the petitioner was his factor in London, receiving a *del credere* commission upon all sales, and guaranteeing to him the full amount of the price at which the goods were sold, for which the petitioner always gave him credit in account, as cash received for his use. The petitioner was in the habit of accepting bills for the accommodation of the bankrupt, upon his engagement to consign cloth to an amount sufficient to cover these liabilities; and on the 2nd January 1839, the petitioner was liable on such outstanding acceptances to the amount of 2190*l.* 18*s.*, having goods in hand, the value of which was much below that sum. The petitioner then insisted upon the bankrupt entering into some engagement in writing for the security of the

ance of the agreement; and the only balance really due to him was 48*l.* 18*s.* 6*d.* Held, that this was a claim for unliquidated damages founded on a penalty, and was therefore not the subject of proof.

petitioner; upon which the bankrupt signed the following undertaking :

“ Messrs. *D. Maclean & Co.* “ London, January 4th, 1839.

“ Gentlemen,

“ The bills which you have accepted on my account, and on my undertaking to provide for the same at maturity, being for my accommodation, I hereby undertake to furnish you with cash for the amount of each bill, three days previous to their becoming due, or to forfeit the sum of 20*l.* for each default. And further, as you have not sufficient cloth in your hands to cover the amount of your engagement on my account, I hereby promise and agree to place cloth in your hands to the full amount of your said engagements, that is to say, to forward you five whole pieces of cloth per week, measuring about 200 yards, or thereabouts; such supplies of cloth to be sent to you at the above rate per week, until the whole amount shall be covered, and to commence from this date. And I further agree, that in case of failure on my part to deliver the said supplies regularly at the above rate per week, I shall forfeit and pay to you the sum of 10*l.* per cloth, *as liquidated penalty*, for such number of cloths as may be deficient in the said stipulated weekly delivery. And I further agree, that, in case of my failing to provide you with the amount of your acceptances on my account three days previous to their maturity, you shall be at liberty to sell my stock of cloth in your hands for the best price you can procure.

“ I am, &c.

Samuel Evans.”

The bankrupt did not furnish the petitioner with cash for the amount of any of the bills outstanding at the date of the above agreement; but the petitioner, on the faith of

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such agreement, continued his dealings with the bankrupt, and from time to time accepted other renewed and substituted bills drawn by the bankrupt, and also various others for his accommodation. In November 1839, the petitioner brought an action against the bankrupt for the amount of the balance due, upon which he gave a cognovit to secure the payment of three bills then outstanding, to the amount of 1424*l.* 4*s.*, and any other bills which the petitioners might accept for his accommodation. On the 27th October 1840, the balance due from the bankrupt was reduced to the sum of 48*l.* 18*s.* 6*d.*

The petitioner alleged, that the bankrupt did not perform the above engagement, and that the liabilities of the petitioner were not, at any period between the 4th January 1839, the date of the agreement, and the 27th October 1840, covered by the value of the cloth sent by the bankrupt; and that, with the exception of five weeks, the bankrupt did not in any week send to the petitioner five whole pieces of cloth, but made default in the number of 387 pieces between the periods above mentioned; by reason of which the petitioner claimed to prove as a creditor under the fiat for the sum of 3870*l.*, as the amount of damages due to him, calculated at 10*l.* for each piece of cloth so deficient. The Commissioners declined to admit the proof, but permitted a claim to be entered for this sum, leaving the petitioner to apply to this Court.

Mr. *Bacon*, and Mr. *Swan*, in support of the petition. The Commissioners rejected the proof on two grounds; first, that the claim of the petitioner was for unliquidated damages; and secondly, that the petitioner had waived any claim for damages by accepting the cognovit. They,

in fact, would not allow that the petitioner had any right to prove beyond the sum of 48*l.* 18*s.* 6*d.* for the balance of his account. Now it appears in this case, that the bankrupt undertook to send to the petitioner five pieces of cloth per week, and that, in case of failure to deliver the same regularly, he expressly engaged "to forfeit and pay to the petitioner the sum of 10*l.* per cloth, *as liquidated penalty*, for such number of cloths as might be deficient." The question is, therefore, whether these stipulated payments of 10*l.* per cloth are not to be considered as liquidated damages, and capable of proof in bankruptcy. In *Fletcher v. Dyche* (a), where a party bound himself to perform certain work for another in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and the work was not finished in the given time,—it was held, that such weekly payments were not by way of penalty, but in the nature of liquidated damages, and might be set off against the party in an action brought by him for work and labour. Mr. Justice *Ashhurst* says in his judgment, that "the object of the parties in naming this weekly sum was to prevent any altercation with respect to the *quantum* of damages, which the defendant might sustain by reason of the non-performance of the contract." And Mr. Justice *Buller* observes, "it was contended that the defendant might have recovered less damages than the amount of this stipulated sum before a jury; but that is not so. In the case of *Lowe v. Peers* (b), where a stipulated sum was claimed for breach of a marriage contract, Lord *Mansfield* said, "where the precise sum is fixed and agreed upon between the parties, that very sum is the ascertained damage, and

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(a) 2 T. R. 32.

(b) 4 Burr. 2225.

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the jury are confined to it." If, therefore, in the present case there was such an ascertained legal debt, as one for the recovery of which the petitioner could have sustained an action at law, he is entitled to prove for the amount of that debt under the fiat. If the agreement does not contravene any rule of law, the petitioner has a right to prove for the amount of the specific sum, which the bankrupt agreed to pay for the non-performance of his contract.

Sir JOHN CROSS. The question is, whether the sum of 10*l.* per cloth, which the bankrupt agreed to forfeit and pay for such number of cloths as might be deficient in the stipulated weekly delivery, is to be considered as liquidated, or unliquidated, damages. There appears to me to be no general rule either at law or in equity on this subject; and the question will therefore depend upon the circumstances of each particular case. Now, in the present case, the 10*l.* was to be paid by the bankrupt by way of *penalty* for the non-performance of the agreement on his part; and although the petitioner alleges that the bankrupt failed to perform the agreement, yet he does not allege that he, the petitioner, has sustained any damage whatever. It therefore seems contrary to every principle both of law and equity, that he should be admitted a creditor for the whole of the penalty, which is alleged to be forfeited under this agreement. The five pieces of cloth per week, which the bankrupt engaged to supply, were intended to cover the amount of the petitioner's then outstanding engagements for the bankrupt, and nothing more; they were not meant to cover the liabilities of the petitioner, entered into by him after the date of the agreement, although the petitioner by an

allegation towards the conclusion of his petition would wish it to be inferred, that such was the construction of the agreement. But, whether it was to cover his liabilities before or after the agreement, the petitioner admits, that on the 27th October 1840 the balance due from the bankrupt was reduced to the sum of 48*l.* 18*s.* 6*d.* So that this is the very extent of the damage, which the petitioner has sustained by the bankrupt's failure to cover his liabilities; although he has now the conscience to claim a right of proof under the fiat for the enormous sum of 3870*l.* "as the amount of damages due to him." It seems to me, that the engagement of the bankrupt to "forfeit and pay the sum of 10*l.* for cloth, as liquidated penalty," was intended to be, as the word implies, nothing but a penalty. Now, as the Courts have from all time endeavoured to relieve parties from penalties where no damage has been sustained, it appears to me to be the duty of this Court to relieve the bankrupt and his estate from this exorbitant demand, and to prevent the petitioner from coming in competition with the *boná fide* creditors of the bankrupt. Even if the bankrupt could have proceeded at law to recover this penalty, it is so unreasonable and unjust, that there is no doubt but that a Court of Equity would have relieved against it (*a*).

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The ORDER was, that the petition should be dismissed, but without costs; and that the costs of both parties should be paid out of the estate, the petitioner undertaking to bring no action for the penalty.

(*a*) See *Astley v. Weldon*, 2 Bos. & P. 346; *Randal v. Everest*, 1 Mood. & M. 41; *Kemble v. Farren*, 6 Bing. 141; *Boys v. Ancell*, 5 Bing. N. C. 390; *Harrison v. Wright*, 13 East, 343.

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*Serjeants' Inn,*  
*May 7.*

A new trustee may be appointed by the Court, in the first instance, under the 6 Geo. 4. c. 16. s. 79. without a reference.

*Ex parte* STUBBS.—In the matter of JOHN VAUGHAN BARBER.—

**THIS** was the petition of a party, praying that he might be appointed a new trustee under a will, in the room of the bankrupt, and might be permitted to prove on behalf of the *cestui que trusts*, against the bankrupt's estate, for the sum of 781*l*.

*Mr. Bacon*, in support of the petition, stated that he was furnished with affidavits as to the perfect respectability of the petitioner, and that the bankrupt and all parties interested consented to his appointment, and approved of him as a fit and proper person to be selected for the office of trustee, and to act as the next friend for the infant *cestui que trusts*.

Sir JOHN CROSS. My only doubt is, whether the Court can appoint a new trustee in the first instance, without referring it to the officer to approve of a proper trustee in the room of the bankrupt, under the 6 Geo. 4. c. 16. s. 79.

*Mr. Bacon* referred to *Ex parte Inkersole* (a), where the Vice-Chancellor of England, after maturely considering the point, made a similar Order, upon being satisfied, on affidavit, that if the matter was referred to the Master, the latter would be induced to approve the person proposed as a trustee; and he therefore thought that he might properly dispense with that circuitry, which would be expensive to the parties, and lead only to the same result.

Sir JOHN CROSS, upon the authority of the case cited, made the

ORDER as prayed.

(a) 2 G. & J. 230.

Ex parte RUMSAY.—In the matter of RENNY.

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MR. *Anderdon* applied for an Order, that a fiat might issue, upon an affidavit of the debt sworn in Scotland, and submitted, that, although the terms of the act, 6 *Geo.* 4. c. 16. s. 13(a), would not have permitted this to be done; *Anon.*(b); yet that the recent statute 1 & 2 *Will.* 4. c. 56. s. 34(c) would justify the Court in issuing a fiat on such an affidavit.

A fiat ordered to issue, upon an affidavit of debt sworn in Scotland.

(a) "And be it enacted, that the petitioning creditor shall, before any commission be granted, make an affidavit in writing before a Master ordinary or extraordinary in Chancery (which shall be filed by the proper officer), of the truth of such his or their respective debt or debts, and shall likewise give bond to the Lord Chancellor in the penalty of two hundred pounds, to be conditioned for proving his or their debt or debts, as well before the Commissioners, as upon any trial at law, in case the due issuing forth of the commission be contested, and also for proving the party to have committed an act of bankruptcy, at the time of taking out such commission, and to proceed on such commission; but if such debt or debts shall not be really due, or if after such commission taken out, it be not proved that the party had committed an act of bankruptcy at the time of the issuing of the commission, and it shall also appear that such commission was taken out fraudulently or maliciously, the Lord Chancellor shall and may upon petition of the party or parties, against whom the commission was so taken out, examine into the same, and order satisfaction to be made to him or them, for the damages by him or them sustained, and for the better recovery thereof may assign such bond or bonds to the party or parties so petitioning, who may sue for the same in his or their name or names."

(b) *Mont.* 137.

(c) "And be it enacted, that it shall be lawful for any creditor to make proof of his debt by affidavit, sworn before one of the said Judges or Commissioners, or before a Master in Chancery ordinary or extraordinary, or if such creditor shall live out of England, by affidavit sworn before a magistrate where such creditor shall be residing, and attested by a notary public, British minister, or consul, subject nevertheless to such rules and orders touching the personal attendance of any creditor to make such proof according to the existing laws and practice in bankruptcy, as the said Court of Review, with the consent of the Lord Chancellor, shall from time to time make and direct."

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Sir JOHN CROSS. If the question depended only on the statute 6 *Geo.* 4. c. 16., the words would be too clear to depart from. The statute 1 & 2 *Will.* 4. c. 56. may make a difference; but as this is the first instance of an application of this nature, it requires some consideration. The practice has been for a petitioning creditor, residing in Scotland, to come to England to make his affidavit.

*Cur. ad. vult.*

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Sir JOHN CROSS on this day thought it better to leave it to the Lord *Chancellor* to alter the old practice, if it were to be altered.

Upon application being made to his lordship, accordingly, the fiat was directed to issue.



Ex parte MOLYNEUX.—In the matter of CHARLES HUMBERSTON and SAMUEL FRODSHAM.

*Lincoln's Inn,*  
May 11.

Where the assignees failed in an action, owing to the invalidity of an Order substituting a new petitioning creditor's debt, and a new trial was ordered; this Court refused to order that no application should be made to it, as to the substitution of such debt, without notice to the defendant in the action.

THE assignees in this bankruptcy had brought an action, in which the validity of the fiat was disputed, and on the trial, an Order of this Court for substituting a new petitioning creditor's debt was, on the authority of *Christie v. Unwin* (a), held invalid for not stating that the new debt was incurred not anterior to the old one; but a new trial was ordered on payment of costs. A motion was now made on the part of the defendant in the action, that no application might be made to this Court, without notice to him, on the subject of the substitution of the new petitioning creditor's debt.

(a) 11 Ad. & E. 373. See *Ex parte Hall*, 1 M. D. & D. 217.

Mr. *Anderdon*, in support of the motion. In *Ex parte Watson* (a), the Court held, that as the action there had gone so far as plea, and the defendant had depended upon the invalidity of the petitioning creditor's debt, it would be unjust to him to make an Order to substitute a new petitioning creditor's debt, without adding "without prejudice to the action." The defendant in this case ought to have an opportunity of attending here, to prevent the Order from being drawn up, without a similar reservation.

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Sir JOHN CROSS. Have you any precedent for such an application?

Mr. *Anderdon*. I am not aware of any authority for such an Order; but it would be in conformity with the practice of all courts of equity, upon a proceeding *quia timet*.

Sir JOHN CROSS. If an improper Order were obtained *ex parte*, an application might be made to this Court to set it aside.

Mr. *Anderdon*. The Order would not, strictly speaking, be one, which the Court could set aside for irregularity.

Sir JOHN CROSS thought the Court ought not to interfere in the mode suggested, and declined to make any Order.

(a) 3 M. & A. 609; 3 Dea. 310.

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Ex parte ALEXANDER HOWDEN and PETER AINSLIE.—  
In the matter of NATHAN LITHERLAND.—

*Serjeants' Inn,  
May 12, 25, 28.*

*A. and B. being in partnership and joint owners of a ship, A. requests C. and D. to accept two bills, amounting together to 2600*l.*, on the security of the ship, which they agree to do, and A. accordingly executes a bill of sale to them, and the ship is registered in their names, A. agreeing that they may sell the ship, and indemnify themselves out of the proceeds, if he neglects to provide for the bills when due. A. becomes bankrupt, and the bills are paid by C. and D., who thereupon assume the ownership of the ship, writing specific directions to the captain in*

*command of her at the Cape, as to procuring intermediate and homeward freight, and for his general government in the prosecution of a voyage to various parts of the Indian seas, and back to London; and these directions are from time to time renewed. The ship, on her arrival, becomes lessened in value, and C. and D. have been put to expense in her necessary disbursements. Held, that C. and D. were not to be considered as mortgagees, but as absolute owners of the ship; that the ship's expenses, therefore, after they assumed such ownership, must fall on them; and that they could only prove for the balance of the 2600*l.*, after deducting the value of the ship at the time they first took on themselves to act as owners.*

*Held, also, that the ship, being the partnership property of A. and B., and registered in the name of the partnership firm, was within the provisions of the 32nd section of the 3 & 4 Will. 4. c. 55., the Registry of Shipping Act, and that A. had therefore a right to deal with her as with any other partnership property, and consequently could sell or mortgage her, without a power of attorney from his partner B.*

THE petitioners, who were insurance brokers and general agents in the city of London, claimed to be mortgagees of a ship named the "*John Heyes*," which originally belonged to and was registered in the name of the bankrupt, who carried on business at Liverpool in partnership with Mr. *John Heyes*, then residing at Barbadoes, but since deceased. It appeared, that in December 1838 the petitioners were instructed to advertize the ship for sale on behalf of *Heyes, Litherland & Co.*, but that, it being found impracticable to obtain the price required, *Heyes, Litherland & Co.* requested the petitioner *Alexander Howden* to allow the ship to be registered in his name as a trustee for them, on the ground of the residence of *John Heyes* in the West Indies, the uncertainty of his life, and the necessity there might be for disposing of the ship by immediate sale. A bill of sale was accordingly executed and registered, dated the 21st of December 1838, purporting to be an absolute assignment to *Alexander Howden* for 3300*l.*, although in point of fact no sum of money was paid. On the same day *Heyes, Litherland & Co.* sent the bill of sale to the petitioners inclosed in a letter, containing the following passages.

“ Liverpool, 21 Dec. 1838.

“ Messrs. *Howden and Ainsley*, London.

“ Dear Sirs.

“ We now enclose bill of sale to your Mr. *Alexander Howden* of our ship *John Heyes*; and we think it would simplify the matter, by having a new register taken out at once in London in his own name, which will make the transfer to a purchaser more easy; afterwards he can send us a letter stating that the vessel is so held on our account; we have been thinking in the event of the *John Heyes* not soon meeting a purchaser at about our price, it would be desirable to look out for a charter for her.”

“ As the amount of the *John Heyes* would be useful to us, owing to our building a new ship, we wish you would permit us to value on you for 3000*l.* at six months date, which we will provide for when due, if the vessel is not sold previously.”

“ Before this bill becomes due, she will, unless unsold, have made a voyage to the West Indies and back, or some other short distance, when she could again be offered for sale; or perhaps we might join you in owning her, and under your good management she would make us money.”

In reply to this letter, the petitioners sent to *Heyes, Litherland & Co.*, a letter dated the 26th December 1838, agreeing to the proposal, but suggesting that the ship should be registered in the name of the firm of the petitioners. The letter then proceeded as follows:

“ It should be further agreed between us, that, provided the ‘*John Heyes*’ shall, according to your proposition, be sent upon a voyage, it must be one such as you name, as shall meet the views of both parties satisfactorily; for instance, not to South Seas, &c., &c.; that we shall receive any freights, and after deducting all ex-

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penses and charges pay the balance to you. We include the usual commission upon such voyages, as well as the premium insurance on the ship for 3500*l.*, which sum we are empowered to do, as our security, if deemed advisable to cancel that for 4000*l.*, now in existence. Should on such voyage any loss or deficiency accrue, you engage to pay us the amount of such loss, whatever it may be, and having a lien on the ship and freight for any loss or claim, for which, as registered owners of the '*John Heyes*,' we may become liable; and it had better be understood, that the ship under this agreement proceed on one voyage only, unless both parties agree to a second, or another agreement shall be entered into between us. With these points understood between us, and that you keep us free of cash advance, as regards the bills named, we shall feel most happy to go into the matter with you."

*Heyes, Litherland & Co.* in reply to this letter, sent the following to the petitioners:

"Liverpool, 27 December 1838.

"Dear Sirs. In reply to your favor of yesterday's date, we have in the first place to state, that we have no objection whatever to the names of your firm being put upon the new register of '*John Heyes*;' we mentioned your Mr. *H.*'s name, only for the purpose of facilitating the transfer when sold, and quite concur in the propriety of having the firm instead, for the reasons you state. In the next place, we purpose paying, when at maturity, the two acceptances for 1300*l.* each; but, in the event of their not being so paid, you have full liberty to sell the '*John Heyes*,' to provide you with funds for the purpose. We think it unnecessary to say anything about the terms you propose, in the event of a voyage being entered into; as

a special agreement can then be made, with reference to the voyage ; we also engage the '*John Heyes*' shall not proceed on any voyage, without your full concurrence."

According to this agreement, the ship was transferred into the name of the petitioners' firm ; and they accepted two bills of exchange, one for 1300*l.*, and the other for 1350*l.*, which they afterwards paid. No adequate offer having been obtained for the ship, she was sent on a voyage by agreement between the two firms, one Captain *Wetherell* being appointed the master on the petitioners' recommendation, and his instructions being contained in a letter written by the bankrupt, dated Liverpool, 9th March 1839, and containing the following passages :

" You will proceed without delay, and with all possible dispatch, to Table Bay, Cape of Good Hope, and address the ship to Messrs. *Phillips, King & Co.*, who are large shippers of her present cargo, and will assist in procuring quick dispatch in the discharge of her cargo. We annex note of freights due on delivery of the goods at the Cape, which you will please take care to receive ; and as the parties are not known to us, be satisfied of payment before delivery of goods." The letter then contained specific directions as to chartering the ship for intermediate employment at the Cape, on a voyage to India, and seeking there for a freight home.

In pursuance of these instructions the captain proceeded to the Cape of Good Hope, and the ship earned between 500*l.* and 600*l.* in outward freight ; upon the account of which the petitioners, at the request of the bankrupt, accepted a bill for 500*l.*, and also paid various sums on account of outfit, insurance, and other expenses.

In June 1839, accounts were received of the death of *Mr. Heyes* at Barbadoes, and on the 10th of June 1839,

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the fiat issued. According to the petitioners' statements, they applied to the assignees to come to some arrangement respecting the ship; but none being effected, the petitioners addressed to Captain *Wetherell* a letter containing the following passages:

" 110, Fenchurch Street, 13th July 1839.

" Dear Sir,

" Independent of a reference to the register of the *John Heyes*, you are aware we are the sole owners of this ship under your command, and beg to hand you our instructions, to supersede those received and signed by Messrs. *Heyes, Litherland & Co.*, who have become bankrupt, and are in the Gazette; and what we now write, you will understand, altogether supersedes any prior instructions you may have received from any quarter respecting the vessel." " Our expectation is, that, on your arrival at the Mauritius, which probably would be in July, the sugars were not shipped for *Heyes & Co.*'s account, but that you will have proceeded upon an intermediate trip, purposing to return to the Mauritius, where you will arrive some time in October or November; this intermediate freight belongs to us, as well on any other freights made since you left the Cape; and, after disbursing the ship, remit through Messrs. *Blythe, Brothers & Co.* to us the balance." " As to your future proceedings, Messrs. *Blythe & Co.* will endeavour to procure a freight to London." The letter then contained very specific directions as to procuring intermediate and homeward freight.

On the 15th of July, two days after the above letter was written, the petitioner sent another letter to Captain *Wetherell*, containing a duplicate of the above, with a postscript, giving further directions as to procuring

intermediate and homeward freight; and, on the 17th of October 1839, they wrote him further instructions on that subject. In November 1839, the bankrupt received a letter from the captain, and handed it over to the solicitors of the assignees. The letter was dated 11th September 1839, and stated, that after a passage of twenty-four days from the Cape the ship had arrived at the Mauritius, and that the captain had been advised, as the sugar would be in late, to proceed to Madras and Calcutta, and that then he would be in time for the crops.

In January 1840, the bankrupt received another letter from the captain, dated Madras roads, 8th October 1839, giving a further account of his proceedings; which he also handed over to the solicitor of the assignees.

On the 4th of January 1840, the petitioners sent a latter to the captain, which, after referring to their former letters, contained further directions as to procuring freight, and the management of the ship, and desiring him not to write to other people about his freights and remittances.

In April 1840, the bankrupt received from Captain *Wetherell* a letter, dated, Calcutta, February 14th 1840, containing the following passage,—“I was much surprised to find, on my arrival here, the change that had taken place since my departure from England, the *John Heyes* now being the property of Messrs. *Howden* and *Ainslie*, of London. I have made my first remittance, according to their instructions, to them. I am now loading for Mauritius, and the ship continues to hold her good name in Calcutta.”

On the 4th of May 1840, the petitioners wrote again to the captain, in reference to his last letter to the bank-

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rupt, giving him fresh instructions, as registered owners, for his government as to procuring freight, and other matters connected with the ship.

In November 1841, the petitioners mortgaged the ship, to raise money for payment of their expenses. They had applied to the Commissioners for leave to enter a claim, until the security could be realized, and the balance should be ascertained, which might remain due after the proceeds had been applied in reduction of the debt; but the Commissioners declined giving such permission. One dividend of 5s. in the pound had been paid, and another dividend was advertised for the 19th instant. The present petition was for a sale of the ship, and application of the proceeds, in the first place, in payment of charges and expenses incurred by the petitioners, with reference to the ship, since the fiat was issued; and then in payment of the debt due to the petitioners on the general account, and for leave to prove for the remainder of the debt.

The assignees alleged, that, instead of the ship being brought home direct from Calcutta, as originally intended, she had been employed for a considerable period in the East Indies; and that it was not until the early part of February 1840, that she reached Calcutta. That on the 23d of April 1840, she sailed from Calcutta, with a cargo of goods, supposed for Madras. That in September 1840, she arrived in Calcutta, from Madras, with a cargo of goods. That in January 1841, she cleared for the Mauritius from Calcutta, with a cargo of goods. That in March 1841, she arrived again at Calcutta from the Mauritius, in ballast; and that, on the 27th of April 1841, she cleared from Calcutta, with a cargo of sugar, and was reported in London on the 12th October 1841.

That by such intermediate employment, the ship was detained upon her voyage for a period of twelve months at the least, having during the whole of that time, and in fact since the month of February 1840, sailed under the control and intermediate instructions of the petitioners; and that such had been the depreciation in the value of shipping during the last twelve months, that, although 2800*l.* was offered for the ship before her departure from England, she would not now produce, on a sale, more than 900*l.* or 1000*l.*, at the utmost.

According to the statements in the petition, the bill of sale of the ship to the petitioners was executed by the bankrupt, on behalf of himself and his partner, under a power of attorney from the latter for that purpose; but the power of attorney was not forthcoming; and one of the questions argued was, whether, independently of the express power of attorney, the bill of sale was not sufficiently supported by the general authority which the bankrupt had as partner. Another question was, whether, as the petitioners were registered as absolute owners of the ship, they could claim in the character of mortgagees, having regard to the Registry Acts. A third question turned upon the conduct of the petitioners after the issuing of the fiat, which, it was contended, amounted to such an assumption of ownership as to preclude the petitioners from saying that the ship was merely a security, or, at all events, such as to render them liable for the losses and damages which had accrued since they took upon themselves to act as owners.

Mr. *Wood*, for the petition. As to the first point,—the general authority of a partner enables him effectually to dispose of the partnership property, such as this ship

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was in the present case. With regard to the second question,—the recent case of *Langton v. Horton* (a) is an authority to show, that a party, though registered as absolute owner, may nevertheless hold as mortgagee; but it is not necessary to go so far, as the agreement was not to hold as mortgagee, but to sell and apply the proceeds in payment or reduction of the debt in respect of the acceptances,—an agreement not affected by the Ship Registry Acts; *Prouting v. Hammond* (b). And as to the assumption of the management and control of the ship,—the instructions sent out by the petitioners did not differ in any material respect from those previously furnished; the destination of the ship was not changed; all the petitioners did, was to urge the captain to return home as soon as possible, so as to put an end to the legal liabilities, to which the petitioners were subject as registered owners of the ship. The case is like that of a colliery, or any other property, in which some act is necessary to be done, to prevent depreciation. If there were a mortgagee in possession of a colliery, he would be entitled to work it; such a proceeding being necessary for the preservation of the property; and he would be entitled to add any loss, which he might thereby incur, to his debt

Mr. *Anderdon*, for the assignees. As to the first point,—supposing the general authority of the bankrupt, as partner, would have enabled him to sell Mr. *Heyes's* share in the ship, this is a power which he could not devolve upon another, the rule being “*delegatus non potest delegare*.” A power to sell would not be well executed, by assigning to another for the purpose of sale.

(a) 6 Jur. 356 and 394.

(b) 8 Taunt. 688.

But it would be difficult to prove the existence of such a power to dispose of a ship, which cannot be regarded as stock in trade.

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As to the registry, the case of *Langton v. Horton* seems certainly at variance with the other authorities; but it is understood to be now under appeal, and cannot, until affirmed, be considered as overruling the former decisions which have settled the law upon this subject; *Battersby v. Smyth* (a), *Brewster v. Clarke* (b), *Mestaer v. Gillespie* (c), *Davenport v. Whitmore* (d), *Slater v. Willis* (e). [Sir J. Cross. Does a direction to sell, and pay over part of the proceeds to another, constitute a mortgage, so as to contravene the act of parliament?] It amounts to the same thing as a mortgage, when the agreement is not for an immediate and absolute sale, but for a sale contingent upon non-payment of a debt.

As to the last point. In the inception of the voyage, it was to be at the risk of the bankrupt; but afterwards the petitioners gave directions as to the destination of the ship, and must bear the loss arising from their own speculation and management. By mortgaging the ship, they showed their intention of adopting the character of absolute owners. It is said, that the assignees have an equity of redemption; but they claim no such right, and insist that the petitioners are absolute owners. He also cited *Helme v. Smith* (f)

Sir JOHN CROSS. By the Registry Act (g), any number of persons, being partners in trade, are empowered to hold a ship as owners in the name of the partnership, without distinguishing the proportionate interest of each

(a) 3 Mad. 110. (d) 2 M. & Cr. 177. (f) 7 Bing. 714.
(b) 2 Mer. 175. (e) 1 Bea. 354. (g) 3 & 4 W. 4. c. 55. s. 32.
(c) 11 Ves. 636.

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owner ; and the act provides that the ship shall be taken to be partnership property, to all intents and purposes. Now this ship was registered by *Litherland & Co.*, as partnership property. The case therefore falls within the 32d section of the act, and the vessel must be considered in the same way as other partnership goods and chattels. *Litherland* had therefore unquestionably a right to mortgage or sell the ship, as he thought was most for the interest of the partnership, without any power of attorney for that purpose. As the assignees disclaim all interest in the ship, it is difficult to know how to deal with the rest of the case ; but I will consider the authorities which have been cited, and will say if it appears to me necessary to call for a reply.

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Sir JOHN CROSS said, it would be more satisfactory to hear the reply in this case, observing that the material question was, whether the petitioners were the owners of the ship in the year 1840.

Mr. Wood, in reply. The petitioners were not the owners, but only the mortgagees in possession. They merely thought it expedient to take under their own control their own security. How can the contract between the parties be changed, and convert the mortgagee of the ship into a purchaser? [Sir John Cross. You are not simply mortgagees ; for you had a power to sell the ship, in case either of the bills should not be paid.] A mortgagee, with a power of sale, cannot himself be a purchaser of the mortgaged property. It is no reason because the petitioners gave directions to the captain of the ship, and endeavoured to make the most of their security, that they are to be considered as the purchasers of the vessel.

Sir JOHN CROSS. In this case, the bankrupt was desirous of selling the ship in question, but, not being able to obtain the price he required for the vessel, it was arranged that the petitioners should advance the sum of 2600*l.* to him, in consideration of the ship being registered in the names of the petitioners, and a power being given them to sell the ship, in order to secure the repayment of the money so advanced. In pursuance of this agreement, a regular bill of sale was executed by the bankrupt to the petitioners, and the ship was registered in the names of the petitioners, as the owners. They were, therefore, complete owners of the vessel, subject only to the liability to account to the bankrupts for the proceeds of the sale. The ship not being sold, she was sent out on a voyage to the Cape, under the agency of these petitioners. In June following a fiat was issued against the bankrupt, the petitioners having previously taken up the two bills for 1300*l.* each, which they had accepted for the bankrupt on the security of the ship. It appears, that the petitioners then endeavoured to come to some arrangement with the assignees in regard to the ship, but, not being able to do so, they sent a letter to the captain, dated the 13th July 1839, stating that they were the sole owners of the ship, and that the instructions, which they then sent him in regard to the management of the ship, were to supersede those which had been previously transmitted to him from the bankrupt, and they added, "that the intermediate freight, as well as any other freights since he left the Cape, belonged to them." This letter, it appears, he duly received; for in April 1840 the bankrupt received from him a letter, dated from Calcutta, in which he says, "I have made my first remittance to Messrs, *Howden*

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and *Ainsley*, according to their instructions." In May following the petitioners again wrote to the captain, giving him fresh instructions, as the registered owners of the vessel. This letter he received in the latter part of 1840. Under all these circumstances it seems to me, that the petitioners took upon themselves the entire dominion of the ship, and assumed the whole property in her as the absolute owners, before the ship was even prepared for her homeward voyage. It has been said, that all this has been done, with the concurrence of the assignees; but the petitioners, in their letter to the captain of the 4th January 1840, give him a positive injunction not to communicate with any other persons but themselves, about his freights and remittances. I am of opinion, that the petitioners have taken to the ship, as owners, and that they must be considered as such owners from the time when they declared themselves to be so to the captain in July 1840. The nominal price of the ship in December 1838, when the bill of sale was executed by the bankrupt to the petitioner *Howden*, was 3300*l.*; but it appears, that he would not then advance on it more than 2600*l.* Whatever expenses have been incurred relating to the ship since July 1840 must fall upon the petitioners. The proper Order, therefore, will be, that the petitioners are entitled to go in and prove for the sum of 2600*l.*, subject to be reduced by the value of the ship in 1840, when they assumed the ownership of her at the Cape. And let the costs of both parties be paid out of the estate.

NOTE:—It was afterwards arranged between the parties, that the petitioners should retain the ship, and prove for 1000*l.*

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Ex parte ABEL SMITH and others.—In the matter of

HENRY HILDYARD and ROBERT HILDYARD.

*Serjeants' Inn,  
May 26.*

**THIS** was a petition for the usual Order in the case of an equitable mortgage by deposit of deeds, the petitioners being bankers, and the deposit being accompanied by a written memorandum, stating the object of the deposit to be to secure any sum or sums of money the petitioners *might* from time to time advance to the bankrupts, in account current with the petitioners. Part of the deposited documents were title deeds of property, of which the bankrupts themselves were legal mortgagees. The remainder of the documents had been deposited with the bankrupts by way of equitable mortgage, with a written memorandum. This memorandum was not deposited with the petitioners; and one of the questions now to be decided was, whether, in consequence of that omission, any valid lien was created by this re-deposit of the deeds, unaccompanied by the written memorandum given upon the original deposit. The sum secured by the original deposit had, in fact, been received by the petitioners, and applied in reduction of their debt; and the question of their right so to receive and apply it was discussed, in consequence of its being urged that they ought to refund it, if they were permitted to realize any thing upon the other documents deposited with them.

But these other documents, which belonged to the bankrupts as legal mortgagees, were also subject to a question; for, before they were deposited by the bankrupts with the petitioners, the mortgage debt secured on the property comprised in them had been transferred, and

To create an equitable sub-mortgage by re-deposit of deeds originally deposited by way of equitable mortgage, it is not necessary that the written memorandum accompanying the first transaction should be deposited upon the second.

A trustee of a mortgage debt for himself and an annuitant, deposits the title deeds to secure a debt of his own, and becomes bankrupt. *Held*, that the assignees could not successfully oppose the depositary, on his application for the usual Order on an equitable mortgage.

The expression "may advance," in the written memorandum accompanying an equitable mortgage, does not necessarily prevent the deposit from being a security for past advances.

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the property itself had been conveyed upon trust to secure an annuity payable by the bankrupts, and one of the bankrupts was one of the trustees of this deed, the annuitant being the other. It was now objected by the assignees, that the deposit by the bankrupt of documents which he held as trustee, to secure his own debt, thus placing the title deeds of the trust property out of his control, was a breach of trust, by which the petitioners could acquire no lien, or at all events no lien of a sufficiently clear and indisputable character, to enable the Court to deal with it in this summary way. The annuitant, it was contended also, ought to have been served with the petition; the Court not being in the habit of making the Order now sought, in the absence of those who have a prior claim to the petitioners on the deposited securities.

A third question was, whether, as the memorandum expressed that the security was for sums which the petitioners "may advance," it could extend to sums already due at the date of the memorandum.

Mr. *Bacon*, for the petition.

Mr. *Keene*, and Mr. *Rolt*, for the assignees.

Sir JOHN CROSS did not consider it necessary to deposit the written memorandum given on the original deposit, when deeds were re-deposited by way of sub-mortgage; and was of opinion, as to the second point in question, that as the deposit would not affect the annuitant's interest, the lien created thereby not extending beyond the interest which the party making the deposit had in the property comprised in the deeds, the Court could not, in the absence of authority, and at the instance of the

assignees, set aside the claim of the petitioners, nor require them to serve a prior incumbrancer with the petition. With respect to the last point, his Honour considered that the question as to the use in the memorandum of future words only, had already been decided (a).

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ORDERED as prayed.

(a) See *Ex parte Farley*, 1 Mont. Deac. & D. 683.

Ex parte WILLIAM GRUNDY.—In the matter of WILLIAM GRUNDY.

THIS was the petition of the bankrupt to annul the fiat, for want of an act of bankruptcy; that relied on by the assignees being, the absence of the bankrupt from his accustomed place in the exchange at Liverpool.

The assignees also relied upon acts of acquiescence in the fiat, on the part of the bankrupt, as precluding him from petitioning to annul. It appeared, that he had requested several of his creditors to be present at the meeting for the choice of assignees, and to vote in such choice for two individuals whom he recommended. And further, that he had, on behalf of a relative, entered into a negotiation with one of the assignees for the purchase of warehouse fixtures and office furniture, forming part of the estate; which purchase was completed, the bankrupt having, by the authority of the assignees, made the necessary arrangements with the messenger for the sale.

Serjeants' Inn,
May 27.

A trader, against whom a fiat is issued, canvasses for particular individuals in the choice of assignees. He also negotiates, on behalf of a relative, for the purchase of a part of the estate from the assignees. Held, that these were sufficient acts of acquiescence in the fiat, to prevent his succeeding on a petition to annul, although the assignees do not satisfactorily establish the commission of an act of bankruptcy.

Mr. *Anderdon*, for the petition.

Mr. *Bacon*, for the assignees.

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Sir JOHN CROSS. This is an application to annul the fiat; and the bankrupt rests his case upon the question, whether a distinct act of bankruptcy has been to day proved to have been committed on the part of the petitioner. The only evidence, which has been brought before this Court, relates to the bankrupt's absence from his usual place of business; but that by itself would be no act of bankruptcy, it being necessary to show, in addition to this, that the absenter was with the intent to defeat and delay the creditors; and in this case it seems that the Commissioners, upon such evidence as was produced before them, have come to the conclusion that such was the intent. The evidence now adduced does not entirely and inevitably lead me to the same conclusion, being, as it seems to me, imperfect as regards the intention. But this is not the only question. The question here is, whether the Court will exercise its discretionary power of annulling all the proceedings, on the application of the bankrupt, simply on account of some doubt as to the evidence respecting the act of bankruptcy. The Court must look to other circumstances. It appears, that, instead of protesting against the fiat, the petitioner was actively employing himself as a canvasser in the choice of assignees, and to that extent therefore was dealing with the fiat as a lawful proceeding. But that is not all; a relation of the bankrupt's wishing to buy from the assignees part of the property taken by them under the bankruptcy, the bankrupt himself became the medium of negotiating this business on behalf of his kinsman, as the purchaser from the assignees. What is the inference to be drawn from these circumstances? Why that the bankrupt acknowledged the title of the assignees to his effects to be good, and acquiesced in the

proceedings; and under these circumstances, without saying that the act of bankruptcy was sufficient, I think the bankrupt has so dealt with the fiat, that he is not now entitled to call on the Court to supersede it.

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GRUNDY.

Petition dismissed.

Ex parte JAMES BENTLEY, JOHN TINDAL HARRIS, and JAMES DIXON.—In the matter of FREDERICK THOMAS WEST.—

*Serjeant's Inn,
May 28 and
June 20.*

THIS was the petition of mortgagees of part of the bankrupt's estate, to have it declared that they were entitled, by virtue of their security, to certain coke ovens and other erections upon the mortgaged premises. The bankrupt was lessee of the premises in question, which were situated upon Commercial Wharf, under a lease for twenty-one years from the 10th of June 1840, with a proviso, empowering him to erect one or more coke oven or coke ovens on the premises, and to use the same, with the coke ovens already erected, for making coke. By an indenture of the 24th of September 1841, the bankrupt mortgaged by demise the premises to the petitioners, by the following description, "All and several, the barge houses, piece or parcel of land, messuages or tenements, and all the other premises, demised by or comprised in the hereinbefore recited indenture of lease, and which in the same lease are described as follows, &c." And then followed a copy verbatim of the description of the parcels from the lease. The mortgage was for 625*l.* 10*s.* 6*d.*, and such other sums as the bankrupt

A lessee erects trade fixtures, firmly attached to the freehold, but removeable as between himself and the landlord. He then mortgages the premises by way of demise, by the same description as that in the lease, and without referring to the new erections; the sum secured being a floating balance, limited to an amount greater than the premises would be worth, without the fixtures. He becomes bankrupt. *Held*, that the mortgagee was entitled to the fixtures.

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might owe to the petitioners, not exceeding 2000*l.* in the whole. Between the execution of the lease and of the mortgage, the bankrupt had erected on the premises, for the purposes of trade, certain ovens for the preparation of coke, with a chimney shaft, and other erections and implements connected therewith, the ovens being buildings mainly formed of concrete, and deeply sunk into the earth, without excavating which, they could not be removed. As between the bankrupt and his landlord, however, they were removeable by the former as trade fixtures.

Previously to the issuing of the fiat, the bankrupt had agreed to sell the premises, together with the coke ovens and other erections thereon, for 1500*l.*, being 1000*l.* for the premises, and 500*l.* for the ovens and erections. This contract was sanctioned by the Commissioners; and the conveyances having been prepared, the purchaser was ready to pay over the purchase money, so soon as it should be ascertained to whom it would be properly payable. The money due upon the mortgage, on the 1st of January 1842, was 4051*l.* 14*s.* 4*d.*; and the question now raised was, whether the petitioners, or the assignees, were entitled to the 500*l.*, being the purchase money of the ovens and erections.

Mr. *Spence*, and Mr. *Hull*, for the petition, cited *Storer v. Hunter* (a), *Ex parte Broadwood* (b), *Ex parte King* (c), *Wynne v. Ingleby* (d), heard before Sir *John Cross* on the northern circuit; *Boydell v. M^r Michael* (e), *Horne v. Barker* (f), *Lawton v. Lawton* (g), *Hubbard*

(a) 3 B. & C. 368.

(b) 1 M. D. & D. 631.

(c) 1 M. D. & D. 119.

(d) 5 B. & Ald. 625.

(e) 1 C. M. & R. 177; 3 Tyr. 974.

(f) 9 East, 215.

(g) 3 Atk. 13.

v. Bagshawe (a), Trappes v. Harter (b), Ex parte Lloyd (c), Lyde v. Russell (d), Clarke v. Crownshaw (e), Longstaff v. Meagoe (f), Ex parte Broadwood (g).

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Mr. *Anderdon*, and Mr. *Hardy*, for the assignees. Nothing more was comprised in the mortgage deed than in the lease; this is clear from the terms of the latter instrument, which is merely an underlease of what was demised to the mortgagor. Now the coke ovens do not fall within this description, nor could in fact be in any manner claimed by the landlord, being fixtures, which by the custom and for the convenience of trade are removeable by the tenant. To hold otherwise, would be to place a most inconvenient restriction on a trader, who has mortgaged the trade premises; for he would not be able, according to such a doctrine, to set up any trade fixture and to remove it again, as the exigencies of his business required, on account of the mortgagee's being allowed to exercise a dominion and control, of which it has been thought expedient to deprive the landlord himself for the benefit of trade. Suppose the case of a nurseryman; if the principle contended for be correct, he would not be at liberty to remove, without the consent of his mortgagee, the young trees which he had planted for the sake of selling them.

(a) 4 Sim. 326.

(b) 2 Cr. & Mee. 153; 3 Tyr. 603.

(c) 1 M. & A. 494; 3 Dea. & Ch. 765.

(d) 1 Barn. & Adol. 394.

(e) 3 Barn. & Adol. 804.

(f) 2 Adol. & El. 167.

(g) 1 M. D. & D. 631. And see Mr. Commissioner *Holroyd's* judgment in *Ex parte Reynel*, 2 M. D. & D. 443, where the authorities are collected, and the subject fully discussed.

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In *Storer v. Hunter* (a), the engines and machinery were demised with the colliery, and formed part of the freehold; and the Lord Chief Justice in his judgment expressly says, that "the terms of the lease manifestly showed that the lessee never had the absolute ownership of the fixtures or the moveables in the collieries." In all the cases, where fixtures have been held not to be in the reputed ownership of a party who becomes bankrupt, they have been erected by the owner of the freehold. Thus in *Clarke v. Crownshaw* (b) it was so held, on the ground that the fixtures were leased by the lessor, and remained his property. So in *Coombs v. Beaumont* (c), it was expressly stipulated that the steam engine was to be used by the lessee of the colliery during his term, but was to be held as the property of the landlord. So, also, *Ex parte Lloyd* (d) was decided on the ground that the steam engine and machinery were such fixtures as were frequently put up by the owners of cotton mills, and let with the mills to a tenant. In no case has it been decided, that trade fixtures are not goods and chattels, where they are put up by the tenant. In *Ex parte Wilson* (e), the Chief Judge draws the distinction between fixtures put up by the owner of the freehold, and those put up by the bankrupt in the character of *tenant*. Where fixtures have been put up by a tenant, being in that case removable as goods and chattels, they never lose their character of goods and chattels in the hands of a subsequent holder. [Sir John Cross. Whenever the usage of trade is recognized by the Courts in favour of the tenant's right to fixtures, it is only in cases where

(a) 3 B. & C. 368

(d) 3 Deac. & C. 765.

(b) 3 B. & Adol. 804.

(e) 4 Deac. & C. 152.

(c) 5 B. & Adol. 72.

the things are movable without damage to the freehold.] In *Trappes v. Harter* (a), Lord *Lyndhurst*, after an examination of the various cases on the subject, said, that "the authorities lead to the conclusion, that where utensils and machinery are erected by the owner for the purpose of trade only, in a neighbourhood where such utensils and machinery would commonly have been removed, and when this can be done without injury to the inheritance, they form an exception to the general rule, and are not to be taken as part of the inheritance, but as personal estate." The ovens, therefore, in this case, passed to the assignees as personal estate, of which the bankrupt was reputed owner, under the provisions of the 6 Geo. 4. c. 16. s. 72. They also referred to *Penton v. Robart* (b), *Elwes v. Mawe* (c), *Ex parte Quincy* (d), *Colegrave v. Dias Santos* (e), *Ex parte Dale* (f), and *Hare v. Horton* (g).

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Sir JOHN CROSS (addressing Mr. *Spence*). I need not trouble you for any further argument as to the question, whether, or not, these coke ovens were in the reputed ownership of the bankrupt, within the 72nd section of the act of parliament. Whether they are to be considered as fixtures, or not, may perhaps be a matter of further inquiry. But I wish to draw your attention to the point, whether these things, fixtures or not, passed by the mortgage deed.

Mr. *Spence*, in reply. All that was decided by *Ex*

(a) 2 Cr. & Mee. 153; 3 Tyr. 603.

(b) 2 East, 88.

(c) 3 East, 38.

(d) 1 Atk. 477.

(e) 2 B. & C. 76.

(f) Buck, 365.

(g) 5 B. & Adol. 715.

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parte Quincy was, that the mortgage of a brewhouse, "with the appurtenances," would not carry the utensils, but the things only belonging to outhouses. But in the present case the mortgage included all the premises comprised in the indenture of lease, and the lease expressly included the coke ovens. Is there any thing in the mortgage deed, to show that it was the intent of the parties that these fixtures should not pass to the mortgagee? In the lease there is an express covenant of the lessee to yield up the premises at the end of the term, together with all erections then or thereafter to be erected thereon, except machinery used for the purposes of trade. Now these ovens cannot be said to be *machinery*, but clearly come within the description of erections, which are to be yielded up to the lessor at the end of the term.

Sir JOHN CROSS. The question on which I requested Mr. *Spence's* consideration will require a perusal of the two deeds of demise and mortgage.

Cur. adv. vult.

June 20.

Sir JOHN CROSS. The question in this case is, whether certain trade fixtures belong to the petitioners as mortgagees, or to the assignees.

The bankrupt became the lessee of the premises for a term of years, on which two coke ovens, constructed of iron and brickwork, were then standing, and afterwards he erected six others, together with a chimney shaft, on the demised premises. He then executed a mortgage to the petitioners for a loan for £25*l.*, and any other advances of money the mortgagees might afterwards make to him, not exceeding in the whole 2000*l.*

The mortgage deed does not expressly convey, nor does it except, the coke ovens, and the assignees claim them on two grounds: first, because they are not included in the mortgage deed, nor were intended to be so; and secondly, if they are included, they have become the property of the assignees by the law of reputed ownership. But as to the latter proposition, I have already said, the same question has been so often decided otherwise, that I do not think it necessary to make any further remark upon it.

In support of the first point, the counsel for the assignees rely mainly on the case of *Trappes v. Harter* (a), decided in the Court of Exchequer, from which, among a confused mass of facts, it may be collected as a rule of law, that a tenant's fixtures, not expressly included in a mortgage deed, do not pass to the mortgagee, if it appear it was not intended by the contracting parties that they should so pass. Therefore, without saying whether a mortgage of land only be sufficient, *per se*, to carry all fixtures belonging to the mortgagor, I think this case may be determined, by considering whether, or not, it was the intention of the parties to the mortgage deed to include the fixtures.

Now there is nothing to the contrary in the deed. And it purports to be a security to the extent of 2000*l.*; whereas, without the coke ovens, it is not worth more than half that sum. And the mortgage deed in terms conveys to the mortgagees, "*all the land, messuages, and tenements, with the appurtenances, and all other the premises demised by or comprised in the deed.*" Now, although two only of the coke ovens are actually demised

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(a) 2 Cr. & Mee. 153 ; 3 Tyr. 603.

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by the lease, yet the rest are comprised therein, and are a subject-matter thereof, and are *appurtenant* to the land. And it appears to me that these terms are sufficient to comprehend them, and that they were intended to be included in the mortgage deed.

I am therefore of opinion, that the petitioners are entitled to the Order as prayed. And let the costs of both parties come out of the general estate.



Ex parte WILLIAM PENNELL and others.—In the matter of THOMAS and WILLIAM STYAN.—

Serjeants' Inn,
May 28.

After a petition has been heard by the Court of Review, and the Order made on it confirmed on appeal by the Lord Chancellor, the Court will not rehear the petition, on the ground that the party has discovered a new fact, which, if he had used due diligence, he might have known before the former hearing; more especially where the object appeared to be, to raise a chance of a different decision in the Court of Appeal.

THIS was a petition of the assignees for rehearing a petition of creditors claiming a lien on certain policies of assurance deposited with them by the bankrupt, on which an Order had been made establishing such lien (*a*), and which Order was affirmed on appeal to the Lord Chancellor (*b*). The point on which the case was decided by the Lord Chancellor was, that, although the notice given to the insurance office of the deposit was after the act of bankruptcy, it was before the date of the fiat, and was therefore a transaction protected by the 2 & 3 *Vict. c. 29*. The present petition now contained a supplemental statement of the assignees, that the notice given to the insurance office was after the creditors had notice of the act of bankruptcy, and therefore that the transaction would not be protected by the above statute. The supplemental allegation was, that the assignees, since the former hearing, had made more minute inquiries, and that they found, that on the 15th

(*a*) See *Ex parte Smith*, 2 Mont. Deac. & D. 213.

(*b*) See *Ex parte Pennell*, 2 Mont. Deac. & D. 219.

March 1841 the bankrupt *T. Styan* called on *Smith*, one of the creditors claiming the lien, and informed him that the house of the bankrupts had stopped payment, and that his own health was so bad, that he was going out of London for several days; for that if he went into the city, he should be overwhelmed with applications, which would be the death of him. It appeared, that the bankrupt's place of business was near the Royal Exchange, which *T. Styan* had just left when he called on *Smith*; and that after this interview he went to his dwelling-house, packed up his clothes, and went to Southampton, and there embarked for France, from whence he did not return until after the fiat had issued.

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Mr. *Anderdon*, and Mr. *Stinton*, in support of the petition. We contend, that the information communicated by the bankrupt to *Smith* on the 15th of March amounted to notice of an act of bankruptcy. If *Smith* had good reason to believe that *Styan* had committed an act of bankruptcy, he was bound by the communication; it was not necessary that he should be absolutely certain of the fact, for notice does not mean knowledge. In *Spratt v. Hobhouse (a)*, it was held that notice of an intended docket was sufficient to put a party on his guard, and that it might be inferred from his conduct that he was apprised of the bankrupt's insolvency. [Sir *John Cross*. The information of the bankrupt's *intention* to commit an act of bankruptcy is not notice of an act of bankruptcy *actually committed*.] We submit that the bankrupt had, in effect, already committed an act of bankruptcy when he called on *Smith*; for he had then left his place of business, and was in transit to the country. As he did not return to his counting-house before the act of

(a) 4 Bing. 173.

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bankruptcy was completed, it follows that the act of bankruptcy was then in the course of being committed.

Mr. *Bacon*, *contrà*, objected, that there was no fact stated in this petition, which the assignees might not have known on the former hearing, and therefore that the petition for rehearing could not be sustained.

Mr. *Anderdon*, and Mr. *Stinton*. In *Ex parte Lavender* (a), it was recognized as a general rule, that a petition may be reheard upon newly discovered facts, except where it is to stay a certificate, or annul a fiat. That rule had been previously acted upon by this Court in *Ex parte Bignold* (b), and *Ex parte Cunningham* (c); and, on the present occasion, we have followed the rule of practice laid down in *Ex parte Cunningham*, namely, that where a petition for rehearing states new facts, it should be in the nature of a supplemental petition, and the original petition should be set down for hearing at the same time. The facts alleged in this supplemental petition, as to the act of bankruptcy, are newly discovered, and were not known before to the assignees.

Mr. *Bacon*, *contrà*. We rely on the objection already urged, that this petition cannot be reheard. The assignees might, before the hearing of the former petition, have examined *Smith* and the bankrupt before the Commissioners, and might thus have obtained the knowledge of all the facts which they now allege they have only since discovered. They say "that since the former hearing they have made more minute inquiries," and have ascertained that *Smith* had notice of the act of bank-

(a) 2 Mont. & A. 119; 4 Deac. & C. 497.

(b) 2 Mont. & A. 214; 2 Deac. & C. 262.

(c) 3 D. & C. 71.

ruptcy, before he gave the notice to the insurance office. But this was a fact, to which on the former occasion his attention ought to have been called. In *Ex parte Big-nold*, which has been cited by the other side, the respondents took the petitioner by surprise at the original hearing, and that case is no authority for this application. And in *Ex parte Cunningham*, the rehearing was by way of indulgence; but that case shows that a party, who applies for a rehearing on the ground of newly discovered facts, ought to have used reasonable diligence in obtaining the knowledge of them on the former occasion. There is no pretence here, that the assignees could not have brought before the Court on the former hearing all the facts which they have suggested now; nor was it until after the Lord Chancellor's judgment, when the case was before him on appeal, that they thought proper to make "the minute inquiries" which they now allege. With respect to the notice of the act of bankruptcy, the case of *Spratt v. Hobhouse* (a) does not apply to this; for there the decision was founded, not on the single circumstance of the defendants having received notice that a docket would be struck, but on the other circumstances of the case, which left no doubt that they were aware of the bankrupt's situation. Now, from what part of the statement of the bankrupt to *Smith* in this case, can it be contended that *Smith* knew that the bankrupt had committed an act of bankruptcy? He only says, that his health was so bad, that he would not return to the city, and that he would go and lie up in the country for a few days, and that he had stopped payment. Could any jury be persuaded to find, upon this evidence, that *Styan* had committed an act of bankruptcy?

(a) 4 Bing. 173.

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Mr. *Anderdon*, in reply.*Cur. adv. vult.*

Sir JOHN CROSS. Considering this petition without reference to the other, in which there was an appeal, it stands shortly thus.

The petitioner held two policies of insurance belonging to the bankrupts, on which he claimed an equitable lien, and applied to this Court for the usual Order for the sale of them. This was opposed by *Smith*, on the ground that no notice of the lien was given to the insurers before the *act* of bankruptcy, though such notice was given before the *date* of the fiat. The Court was of opinion, that no notice of the lien was necessary, and made the order, pursuant to the petition; and the assignees now, after the lapse of nearly a whole year, apply for a rehearing, alleging that they have recently discovered, since that Order was obtained, that the petitioner had notice of an act of bankruptcy before he gave notice of his lien to the insurers. But as it appears that the assignees, by the same diligence they have employed since, might have discovered this fact as well before, as after, the former hearing, I am of opinion, that it would be altogether irregular and unjust to set aside the Order now in force, and reopen the question, which has been so long at rest. As to the appeal, this case has no connection with it; nor had the creditor in the present case any concern with it, except that he consented to suspend his proceedings, until that appeal was determined. There is therefore nothing peculiar to this case to warrant such a departure from the ordinary course, especially as the new facts would not alter the judgment of this Court, and the rehearing has no other object but to raise a chance of a

different decision in the Court of appeal, upon a technical point involving no general question. I do not think I ought to encourage assignees to speculate with the funds of their estate in so hazardous an experiment.

The petition for rehearing, therefore, must be dismissed.

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and others.

In the matter of SIMMONS, BROOKE and others. —

MR. *Anderdon* applied for an immediate Order, that a separate fiat, issued against one of four partners, might be directed to the same Commissioner in London, to whom a former joint fiat against the three other partners had been directed; and that the same official assignee might be appointed under both fiats. The application was supported by an affidavit of the official assignee, stating that the first fiat issued on the 17th May, directed to Mr. Commissioner *Merivale*, and that the separate fiat issued on the 27th May, directed to Sir *C. F. Williams*, and that it would be for the mutual benefit of the estate, that the same Commissioner should act under both fiats; the accounts being so blended, that there would be a difficulty in working the separate fiat before a different Commissioner, and with a different official assignee.

Serjeants' Inn,
May 30.

A separate fiat issued against one of four partners, after a joint fiat issued against the others, will be ordered to be directed to the same Commissioner, notwithstanding the partnership has been dissolved, and the 17th section of the 6 Geo. 4. c. 16. only applies to existing partnerships.

Sir JOHN CROSS. The 17th section of the 6 Geo. 4. c. 16. prescribes, that, after a commission issued against two or more members of a firm, any other commission issued against any other member of the firm, shall be directed to the same Commissioners to whom the first commission was directed.

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Mr. *Anderdon*. That section only applies to existing partnerships. In the present case the partnership has been dissolved, before the fiat issued.

Sir JOHN CROSS. You may take an Order that the separate fiat shall go to the same Commissioner as the former one; that is, I think, only giving proper effect to the meaning of the 17th section. But this Court cannot dictate to the Commissioner, what particular official assignee he shall employ.

*Serjeants' Inn,  
May 31 and  
June 2.*

Ex parte MAGNUS.—In the matter of MAGNUS.

*Quære*, whether a debt, for which a bill of exchange is given, is thereby completely extinguished, so as to be incapable of supporting a fiat, if the bill be negotiated, and be out of the possession of the creditor at the time of the act of bankruptcy.

Where, on a petition to annul for want of a petitioning creditor's debt, the validity of the debt is a fair subject of doubt, the Court will allow the petition to stand over, to give time for an application to substitute a new petitioning creditor's debt.

THIS was the bankrupt's petition to annul the fiat, on the ground of the insufficiency of the petitioning creditor's debt. There were two petitioning creditor's debts, one of 79*l.*, claimed by Messrs. *Rogers*, and another of 78*l.*, claimed by Messrs. *Holtum*, and both were disputed; but the dispute, as to the former, was as to the facts merely. The latter debt was made up in part of the price of certain goods sold and delivered by Messrs. *Holtum* to the bankrupt. But for this amount the bankrupt had indorsed and delivered to them a bill of exchange, which they had negotiated; and it was now sworn, that the bill was not in their hands at the time when the act of bankruptcy was committed.

Mr. *Kenyon Parker*, and Mr. *Wright*, for the petition. The case is settled by *Ex parte Botten*(a), the circumstances of which were the same. Sir *G. Rose*

(a) Mont. & Bli. 412.

there said, "The debt is clearly bad, for, at the time the fiat issued, it had been transferred to the indorsee of the bill." They also referred to *Ex parte Douthat*(a).

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*Ex parte*  
 MAGNUS.

Mr. *Anderdon*, for Messrs. *Holtum*. This case is distinguishable from *Ex parte Botten*, cited; for the affidavit here only states that the bill was not in the petitioning creditors' hands at the time of the act of bankruptcy, and does not say that it was out of their possession when the fiat issued. And the authority itself is not conclusive, there having been no contest upon the subject. [Sir *J. Cross*. It was merely the opinion of one of the judges, the others were absent; and the application was merely to substitute a new petitioning creditor's debt, which no one opposed. Have you looked at *Ex parte Patzker*(b)?] The fiat there was annulled on a different ground, and the petitioning creditor's debt was held to be good.

The 15th section of 6 *Geo. 4. c. 16.* enables a person, who has given credit to a trader for valuable consideration, for any sum which shall not have become payable at the time such creditor committed an act of bankruptcy, to be a petitioning creditor, whether he shall have any security or not; the last provision being introduced for the first time by that act. Now there was a debt here for goods sold and delivered; and whether the bill extinguished that debt or not, could not be told until it was paid. In the meantime it was a security. In *Ex parte Douthat*, it was held that a commission might issue against the drawer of a bill, although the bill had not been presented, and was not in fact due.

(a) 4 B. &amp; Ald. 67.

(b) 3 M. &amp; A. 326; 2 Dea. 469.

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Ex parte
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Mr. Wright, in reply. The distinction attempted to be drawn between this case and *Ex parte Botten*^(a) is untenable; for the important fact is, the debt being due at the time of the commission of the act of bankruptcy.

Sir JOHN CROSS. I own that if it were not for the authority of *Ex parte Botten*, I should have inclined to think that the contingency which existed of the bill being dishonoured, and of the creditor being thereby remitted to his original debt, would have been sufficient to constitute that debt a sufficient foundation for a fiat, within the meaning of the act; and that for this purpose it should not be considered as extinguished, but that its extinction would depend upon the ultimate payment of the bill of exchange. As, however, a very strong opinion was expressed by one of the judges of this Court in the case referred to, I must take time to consider whether I am not bound by that authority.

Cur. adv. vult.

June 2.

On this day, his Honour suggested that the best way of meeting the difficulty would be, to substitute the holder of the bill as petitioning creditor.

Mr. Kenyon Parker objected, that this had never been done upon a petition to annul; but

His Honour considered the point in dispute as sufficiently doubtful, to justify him in ordering the petition to stand over, for the purpose of substituting a new petitioning creditor's debt.

ORDERED accordingly.

(a) *Mont. & B.* 412.

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Ex parte MARY ANN HAKEWILL and THOMAS HAKEWILL.—In the matter of ASHFORD WISE, NICHOLAS BAKER, and WILLIAM SEARLE BENTALL.

Serjeants' Inn,
June 2.

THE petitioner, *Mary Ann Hakewill*, was the mother of the other petitioner, and by this petition they appealed from the rejection of a proof against the separate estate of *Bentall*, in respect of a breach of trust alleged to have been committed by him, as the surviving trustee of the marriage settlement of *Mary Ann Hakewill*. The settlement was dated the 29th September 1812, and the question turned upon the construction of its provisions, as explained by the recitals. The material recitals were, that a sum of 400*l.* was due to the intended husband, and his father, in respect of the purchase money of a freehold estate, and that it had been agreed between the parties to the settlement, that this sum should be paid to the bankrupt, *W. S. Bentall*, and one *William Hannaford*, upon trust to lend or invest the same upon such security or securities as should be approved of by the intended husband, and his father, either upon government, real, or *personal* securities, or in the purchase of lands and hereditaments either in fee, or for terms of years, and to pay the annual proceeds to the father for life, then to the intended husband for life, and after the decease of both of them, to the petitioner, *Mary Ann Hakewill*, and such children of the marriage as the husband should appoint, and for want of such appointment, to the eldest, or only son of the marriage. By the witnessing part of the deed, the father and son assigned the debt of his father, or the survivor, *in writing*, to invest the trust money in the funds, or on real security, or in the purchase of freehold or leasehold estates. Held, that the last clause controlled and interpreted the former parts of the settlement; and that a loan of the trust fund to a bank, in which one of the trustees was a partner, on an interest-note, without a written consent, was a breach of trust, constituting a provable debt against the separate estate of the trustee.

A marriage settlement recites, that it had been agreed that a debt should be assigned to the trustees, upon trust, after calling it in, to invest the money upon such security as should be approved of by the husband and his father, either on government, real, or personal security; and, by the witnessing part, the debt is assigned upon trust, on calling in and investing the same on government, real, or personal security, or in the purchase of lands, at the sole order, and by the sole direction, consent, and approbation of the husband and his father, or the survivor, to stand possessed thereof on the trusts therein mentioned. Then followed the trusts, and a power, in the usual form, for the trustees, with the consent of the husband and

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HAKWILL
and another.

400*l.* to *Bentall* and *Hannaford*, upon trust immediately to place out the "said sum of 400*l.*," upon the bond of the purchaser of the estate from whom the debt was due, at interest, at the rate of 5*l.* per centum per annum; and during such time as the same should remain on such security, or on calling in, or on receiving the same, and then investing the same sum in government, real, or personal security, or in the purchase of lands or leaseholds, but at the sole order, and by the sole direction, consent, and approbation of the father and son, and the survivor of them, to stand possessed thereof, upon trust to pay over the interest, dividends, and rents unto the father for life, and after his death, to the son for life, and after the deaths and deceases of both father and son, to pay the interest, profits, dividends, and rents, of the principal sum of 400*l.*, and the security or securities for the same, and the interest and produce thereof, to the petitioner, *Mary Ann Hakewill*, for her life, and to the children of the marriage, as the husband should appoint; following the language of the recital. And there was a power for the trustees, from time to time, with the consent of the father and son, or the survivor of them, to be testified by some writing under his or their hands, and after the decease of the survivor of them, of the trustees' own authority, to lay out and invest the principal sum of money thereby assigned at interest, either in or upon any of the stocks or funds of Great Britain, or upon real securities in England, and to vary such securities from time to time as occasion should require, or as the father and son, or the survivor of them, and after the decease of the survivor of them, the trustees should think fit; and upon trust, that the trustees should, if thereunto requested by the father and son, or the survivor of them, by any

writing under his, her, or their hand or hands, lay out and invest all or any part of the sum of 400*l.*, or the produce of the stocks, funds, and securities, in and upon which the same should be invested, in the purchase of freehold or leasehold estates.

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and another.

Soon after the execution of the settlement, the bankrupt *Bentall*, and his co-trustee, placed out the sum of 400*l.*, mentioned in the settlement, upon the bond of the person from whom the debt was due, and received the interest thereon, which they applied according to the trusts of the settlement. In 1812 the father died. The debt was paid in the year 1828; and the amount was in 1830 invested by the trustees in the purchase of 513*l.* 8*s.* 3 per cent. consols. In 1838, however, they sold out this sum of stock, which produced 452*l.* 13*s.* 9*d.*, and they paid over 52*l.* 13*s.* 9*d.*, part of this sum, to the husband for his own use, and paid the sum of 400*l.*, the residue thereof, into the hands of the bankrupts, who were bankers at Totness, taking from them an interest note. A credit to that amount was accordingly given by the bank to their own partner *Bentall*, and his co-trustee, as trustees of the settlement; and interest at 3*l.* per cent. on the 400*l.* had been regularly paid to the person entitled to the interest on the fund under the settlement, up to the 31st of December 1840. The co-trustee had since died, as had also the husband, leaving the two petitioners, his widow, and his eldest son, and without having exercised the power of appointment. The *fiat* having issued in 1841, the petitioners tendered a proof for 400*l.* against the separate estate of *Bentall*, which the Commissioners declined to admit. From this decision the petitioners now appealed.

On the part of the respondents, the assignees, an affidavit of the bankrupt, *Bentall*, was read, whereby he

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deposed, that the sale of the consolidated Bank Annuities was made at the express and sole order, direction, consent, and approbation of the husband, and that the investing the sum of 400*l.*, part of the proceeds of the sale, in the banking firm, at interest, on their promissory note, was at the sole direction, consent, and approbation of the husband, and that the sum remained so invested up to the time of the bankruptcy.

Mr. *Kenyon Parker*, and Mr. *Faber*, for the petitioners. This is a clear case of breach of trust. The settlement only empowers the trustees to invest the money in the funds or upon real securities, and this was only to be done at the request *in writing* of the husband and his father, or the survivor of them. Now the sale in this case was made in the lifetime of the husband; and although the surviving trustee, one of the bankrupts, swears that it was done at the sole direction, consent, and approbation of the husband, he does not venture to allege, that such consent was given, as the settlement required it to be, *in writing*. It is, moreover, not competent for the tenant for life, by directing an investment in a particular security, to exempt the trustees from responsibility, if the investment should turn out to be an improper one. They are to exercise their own discretion upon the subject. At all events, it is not competent for them to lend the trust monies to a firm, of which one of the trustees is a partner; *Langston v. Ollivant* (a), — *v. Walker* (b), where the Master of the Rolls said, “when a testator empowers three executors to lend money on personal security, he must be taken to rely upon the united vigilance of the three, with respect

(a) Cooper, 33.

(b) 5 Russ. 7.

to the solvency of the borrower. If two of the three lend it to the third, this object is defeated, and it is a breach of trust."

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HAKEWILL
and another.

Mr. *Keene*, for the assignees. The trustees had no discretion to exercise in this case, the trust being to invest the money upon government, real, or personal security, but at the sole order, and by the sole direction, consent and approbation of the father and son, or the survivor of them. This circumstance completely distinguishes the case from the cases cited.

Mr. *Kenyon Parker*, in reply, was stopped by the Court.

Sir JOHN CROSS. In 1833, which was eight years before the bankruptcy, the sum of 400*l.* was invested on government securities, in the name of one of the bankrupts and another person, as trustees under an indenture of settlement, executed in the year 1812. It continued so invested for five years, without being disturbed; but at the end of that period, for some reason which has not been assigned, the trustees thought fit to sell out that stock, and to place part of the proceeds, amounting to 400*l.*, in the bank of the bankrupts, and to make the tenant for life a present of the difference. I have looked at *Bentall's* affidavit, to see his account of this transaction, and why it took place. He explains it thus, that the sale of the stock was made at the express sole order, direction, consent, and approbation of Mr. *Hakewill*, following the exact words of the settlement, but without stating a single particular with reference to what occurred on the occasion, or in what manner the consent and

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HAKEWILL
and another.

approbation were expressed. The use of such general expressions lead me to suppose, that there was something else in the matter, which it was not convenient to state. I think, that *Hakewill* was tempted to give his consent by the bonus of 50*l*. The trustee derived profit as a banker, by getting this money into the concern, and I think the main motive of selling out the stock was to enable the trustee to use the money for his own purposes. I consider it nothing else than a breach of trust.

But if the question is to depend upon something more technical, only let us look at the words of the settlement themselves. The part of the instrument, by which the power of varying securities is expressly given, requires the consent of *Thomas Hakewill* the elder and *Thomas Hakewill* the younger, or the survivor of them, to be testified by some *writing* under their or his hands or hand. And I think the intent of the clause was to control, qualify, and define the other parts of the deed, in which the power is only incidentally referred to, and that the clause was introduced for no other purpose. As the consent of the tenant for life was never obtained in *writing*, it appears to me that a breach of trust was committed, and that the proof must be received as prayed by the petition.

Mr. *Kenyon Parker* asked for costs.

Sir JOHN CROSS. I cannot charge the other creditors with these costs. Besides, it would not be the usual course, on an appeal from the decision of the Commissioners.

Ex parte GREGORY and others. — In the matter of FRANCIS WAKEFIELD and CHARLES GREAVES WAKEFIELD. —

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Serjeants' Inn,
June 2.

THIS was a petition of the trustees of certain stock, praying that the dividend warrants, which they had entrusted to the bankrupts, for the purpose of receiving the dividends on the stock, and which the bankrupts had deposited with a third person, as a security for their own debt, might be delivered up to the petitioners. It appeared that the bankrupts were stockbrokers, and were the agents of the trustees to receive the dividends in question.

Dividend warrants, on which the bankrupts, in their character of stockbrokers, were intrusted to receive the dividends, and which they had pledged for their own debt, were ordered to be delivered up to trustees, who had employed the bankrupts as their brokers.

Mr. Bacon, for the petition, cited *Davis v. The Bank of England* (a), and *The Bank of England v. Davis* (b).

The assignees appeared by counsel to submit to any Order.

The COURT made the ORDER as prayed (c).

(a) 2 Bing. 393.

(c) *Ex relatione* Mr. Ayrton.

(b) 5 B. & C. 185.

Ex parte JOHN TURNER, and HANNAH, his Wife, WILLIAM WEST TURNER, and CORNELIUS HUFTON TURNER. — In the matter of JOSEPH WEST and another.

Serjeants' Inn,
June 3.

THIS was the petition of legatees, for payment in full of their legacy, out of the dividends declared upon a proof, in respect of a *devastavit*.

A pecuniary legatee is entitled to be paid in full, out of a dividend payable on a proof made in

respect of a *devastavit* committed by a bankrupt, who is executor and residuary legatee.

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and others.

The will was that of one *Joseph Hufton*, dated the 9th October 1823, whereby, after bequeathing several specific and pecuniary legacies, the testator gave and bequeathed to his niece, the petitioner, *Hannah Turner*, 100*l.*, to be paid by his executor, within six months after his decease, free from the debts, controul, or engagements of her husband. And he gave and bequeathed all the rest, residue, and remainder of his estate and effects, wheresoever and whatsoever, to his nephew, *Joseph West* (one of the bankrupts); and directed that such residue (if any) should be applied, divided, and disposed of, by the said *Joseph West*, amongst such and so many of his the said testator's relations, at such times, and in such parts and proportions, as the said *Joseph West* might think proper, without being subject or liable to render any account thereof to such relations, or any of them; and the testator appointed *Joseph West*, with *Robert West*, *Thomas West*, and *Benjamin Clark*, executors of that his will. By a codicil, the testator revoked the bequest of the legacy of 100*l.* to the petitioner, *Hannah Turner*, and in lieu thereof directed his executors to pay the interest of the sum of 100*l.* to the petitioner, *Hannah Turner*, during her life; and after her decease, to pay the principal sum of 100*l.* unto and equally amongst her three sons, the petitioners, *William West Turner*, and *Cornelius Hufton Turner*, and *Joseph Turner*, since deceased, as and when they should severally attain twenty-one, with benefit of survivorship, between and amongst them, in case any of them should die under that age, without leaving lawful issue. The will was proved by the bankrupt, who paid the debts and legacies, except the legacy of 100*l.*, which was never invested according to the directions of the will, nor was

any interest paid in respect of it; the amount due on account of principal and interest being 137*l.*, on the 25th January 1837, when the fiat issued. Under an Order of the Court, the bankrupt had proved against his own estate for 402*l.* 14*s.* 7*d.*, in respect of the *devastavit* which he had committed, and the dividends on the proof amounted to 156*l.* 1*s.* 4*d.*, which sum was to abide the further direction of the Court. The assignees contended, that a dividend only was payable on the legacy of 100*l.*(a).

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 and others.

Mr. *Keene*, for the petition.

Mr. *Anderdon*, for the assignees.

Sir JOHN CROSS. If any other person than the bankrupt had proved, that person would have received this 156*l.*; and can there be any doubt that he would have had to pay, in the first place, the legacy of 100*l.*, and then the remainder only to the assignees, as the bankrupt's representatives? The petitioners are entitled to 100*l.* of the 156*l.*, but not to interest.

ORDERED accordingly.

(a) See *Dyose v. Dyose*, 1 P. W. 305; *Ex parte Chadwin*, 3 Swanst. 387; *Willmott v. Jenkins*, 1 Bea. 401; *Morris v. Livie*, 1 Y. & C. N. C. 380.



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Serjeants' Inn,
June 3.

Residuary personal estate is bequeathed to the testator's widow, and two other trustees, who are also the executors and executrix of the will, upon trust to be converted, with all possible speed, into money, to be laid out in the purchase of an annuity for the lives of the widow and children; and the trustees are directed to pay the annuity to the wife, for the sole use and benefit of the children. After the testator's death, the widow is permitted, by the acting trustee, to retain possession of specific articles of furniture, part of the residuary estate; and eight years after the testator's death she marries again, and takes these articles to the husband's house, where the testator's children reside with her; and after six years more, the second husband becomes bankrupt. *Held*, that the trustees of the will could not claim the furniture from the assignees.

Ex parte MARY ANNE MOORE and GEORGE ST. JOHN KEEL.—In the matter of MOORE.

THIS was the petition of the executrix and executor of the will of *Thomas Glover*, deceased, praying that the assignees might be ordered to deliver up a part of the testator's assets, consisting of specific articles of furniture, of which the assignees had taken possession, among other property found by them in the house occupied by the bankrupt.

The petitioner, *Mary Anne Moore*, who was the bankrupt's wife, was the widow of the testator, *Thomas Glover*, who died on the 15th November 1828, having made his will in the following terms: This is the last will and testament of me *Thomas Glover*, late of Holloway, surgeon. After the payment of all my just debts and funeral expenses, I give and bequeath all the residue of my property to *Mary Ann Glover*, my lawful wife, also to *John Glover*, senior, of Montague Square, London, and to *George St. John Keel*, excise officer, London, in trust to convert the same, with all possible speed, into money, and to lay out the same in the purchase of an annuity, for the lives of my dear wife and children, on government, freehold, or other good and sufficient security, at the sole discretion of my said trustees, and to stand possessed of such annuity in trust, and to pay the same, as it becomes due, unto *Mary Ann Glover*, for the sole use and benefit of my said children; and I do declare that the receipt of my trustees, or the survivor of them, in case of sale, shall be a sufficient discharge to the purchaser or purchasers of such annuity; and I do further

A bankrupt's wife, failing on petition, not ordered to pay costs.

declare and appoint the said *Mary Glover, John Glover,* and *George St. John Keele*, as above described, executors of this my will. In witness whereof, &c." The testator left one son and two daughters him surviving. The will was proved by the petitioners alone, power being reserved for the other executor to prove. No sale was made of the testator's household furniture, but it remained in the possession of his widow and the testator's surviving children, who had continued to reside with their mother ever since the testator's death.

In June 1836, the widow married the bankrupt, and thereupon went with the children to reside in the bankrupt's house, taking with her the household furniture of her late husband, the sale of which the petitioners postponed during the minority of the children, considering this course most for their benefit.

The fiat issued on the 3rd January 1842.

Mr. *Bacon*, in support of the petition. The rule is clear, that, if the bankrupt is the true owner as trustee, and his possession is consistent with the trust, the case does not fall within the 72nd section. [Sir *John Cross*. How can the possession be said to be consistent with the trust, when the will directs the property to be sold with all convenient speed, and it is now unsold after the lapse of fourteen years?] The widow was entitled to the proceeds of the property during her life for the benefit of the children, and if the executors considered it for the children's advantage that the sale should be postponed, that was an exercise of their discretion, which can only be questioned in the Court of Chancery, on the application of the *cestuis que trust*. No Master would report in this case that a sale would have been beneficial to the

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infants. [Sir *John Cross*. It was decided in the case of *Quick v. Staines (a)*, that if an executrix use the goods of the testator as her own, and marry, and then permit the goods to be treated as the property of her husband, they may be taken in an execution against him.] Here the property was held by the widow, as trustee, which is different from the case of a mere executrix; *Ex parte Martin (b)*. The law is settled with regard to a trust by *Ex parte Horwood (c)*, where furniture was held upon trust for a widow for life, and after her death, for her daughter. The trustee assigned it to a second husband of the tenant for life, thereby committing a breach of trust; and although the second husband dealt with the furniture as his own, and actually sold part of it, his assignees, on his becoming bankrupt, were not allowed to retain it. The Court always gives effect to the trust, and does not suffer it to be affected by the bankruptcy of the trustee, where the property can be distinguished; and so it was held in a court of law in the *Earl of Shaftesbury v. Russell (d)*, which was decided upon the statute 43 Geo. 3. c. 99. s. 38., whereby collectors of taxes have the same remedies as creditors under a bankruptcy. It was there held, that although the Duke of Marlborough had the apparent ownership of the furniture at Blenheim, yet as that state of things was consistent with the provisions of his settlement, no seizure could be made.

Mr. *Randall*, for the assignees, was stopped by the Court.

(a) 1 B. & P. 293, and see *Gaskell v. Marshall*, 2 Mo. & Mal. 133; and *Ex parte Massey*, 2 M. & A. 351.

(b) 2 Ro. 331.

(c) Mont. & M'Ar. 169; Mont. 24, S. C. on appeal.

(d) 1 B. & C. 666.

Sir JOHN CROSS. In 1828, that is to say, fourteen years ago, the first husband of Mrs. *Moore* appointed her his executrix, and directed the residue of his property to be converted into money with all possible speed, and the proceeds to be laid out in an annuity. Now, instead of converting the property into money, according to this direction, with all possible speed, no step is taken to indicate an intention of carrying the direction into effect; but the widow thought fit, considering it perhaps to be for the benefit of the family, though of that I cannot judge, to take to herself this property. By so doing, she committed a *devastavit*, and made the goods her own. She has retained them for fourteen years in her own possession, without making any schedule of them, or doing any thing to show that they were trust property. Eight years afterwards she married the bankrupt, and upon that occasion this property was not scheduled or distinguished in any way, but was carried by her to the house of her husband, and thenceforth used and enjoyed by him, without any claim being set up to them as trust property until this bankruptcy took place. I think, therefore, that this trust was never considered as having any existence before the bankruptcy occurred, which was fourteen years after the property was given to the widow to be converted into money as soon as possible. I consider it as property which she thus appropriated to herself and made her own. She was responsible to the children for her administration of the estate, and of course did not get rid of that responsibility by her conversion of the property to her own use. But I am of opinion, that the property, as regards the world at large, had long since ceased to be the property of the testator. The case of *Quick v. Staines* is decisive of the question; there,

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exactly as occurred in this case, the executrix used the goods of the testator as her own, and afterwards married, and then used the goods as those of herself and her husband; and it was decided, that they might be taken in an execution against the husband. Therefore, by the general law, independently of the 72nd section of the bankrupt act, the point is settled against the claim of the petitioners.

Mr. *Randall* asked for costs.

Mr. *Bacon* objected, that the assignees had suggested a petition as the cheapest mode of trying the question.

Sir JOHN CROSS. If the bankrupt had presented this petition, he would have paid no costs, and I conclude that his wife is no better able to pay them.

Petition dismissed without costs.

*Serjeants' Inn,
June 4 and 20.*

A Commissioner, who has approved of the security offered by a debtor under 1 & 2 Vict. c. 110. s. 8., is *functus officio*, and cannot revoke his approval.

Quere; if he may impose upon the debtor the terms of giving the creditor two days' notice, before offering security.

Ex parte NEALE.—In the matter of NEALE.

THE question in this case was, as to the sufficiency of an act of bankruptcy, which was alleged to have been committed by the petitioner, in failing to comply with the requisitions of the 8th section of the act, 1 & 2 Vict. c. 110, the petitioner submitting that he had fulfilled those requisitions, and praying that the fiat might be annulled.

The affidavit of the debt and trading was filed, and the petitioner was served with the notice prescribed by the act, in the usual way, on the 3rd May 1842.

At five o'clock in the afternoon of the 23rd, the petitioner caused notice to be served at the office of the London agent of the petitioning creditor's solicitor, that he should attend the Commissioner on the following day, with his sureties; whereupon the clerk to the London agent told the person who served the notice, that the notice could not be accepted, as one of the proposed sureties resided in Essex, and the agent would have no time to communicate with his client, who lived also in Essex, at Billericay. To this the person who served the notice replied, that he should leave the notice and attend the Commissioner, according to the terms of it, on the 24th; and if the Commissioner should raise any objection as to the shortness of the notice, the parties would attend again on the 25th, at eleven o'clock. He added, that he should forthwith proceed to Billericay, to serve the solicitor for the petitioning creditor himself with a similar notice. This, it appeared, was not done; but copies of the notice, and also of the affidavits of the sureties, which accompanied the same, were forwarded by the post to the solicitor of the petitioning creditor, on the evening of the 23rd. On the 24th, the petitioner, with two sureties, attended the Commissioner; and, no one appearing on behalf of the petitioning creditor, a bond in the usual form was executed, in the penal sum of 1600*l.*, and was approved of by the Commissioner, who caused his approval to be indorsed thereon in the words following:—"24th May 1842. Approved of by me, *J. H. Merivale.*" The bond having been registered in the office, was delivered on the same day to the London agent of the petitioning creditor's solicitor. On the 25th, the petitioning creditor and his solicitor attended at Basinghall Street, to oppose the

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sureties; but, the Commissioner not being in attendance, they attended again on the 26th, having given notice of their intention so to do to the petitioner's solicitor. The Commissioner, being accordingly attended on that day by the solicitors for both parties, and having heard the facts stated to him relative to the service of the notice of attending him, as well as to the approval of the bond and sureties, and having heard affidavits read impugning the competency and responsibility of the proposed sureties, decided, that his approval had been obtained by misrepresentation, and that the proposed sureties were insufficient, and on both grounds disallowed the bond and his approval thereof, which he accordingly cancelled. The registry or entry of his approval was also cancelled. A docket was then struck, and, upon the opening of the fiat, the facts of the case were stated to Mr. Commissioner *Fonblaque*, the Commissioner to whom the fiat was referred, who was of opinion that a valid and legal act of bankruptcy had been committed, and accordingly signed the adjudication.

Mr. *Bacon*, for the petition. All that is required by the statute is for the debtor, on or before the twenty-first day, to enter into a bond, of which the Commissioner approves. That was done here, and consequently no act of bankruptcy was committed. The Commissioner had no jurisdiction, after the twenty-one days had expired, to recall his approval. And it would be productive of the utmost injustice, if he could; for, if he manifested his disapproval of the sureties after the twenty-first day, the debtor could not find others, the time having elapsed, but would be irretrievably a bankrupt by force of the act.

Mr. *Anderdon*, and Mr. *Keene*, for the petitioning creditor. The Commissioner has, under the act, the same power which a judge of the superior Courts has in taking bail, and can revoke his own order, if he have been induced to make it by misrepresentation. In this case, he was informed that the parties were on friendly terms, which appeared the more probable, as it happens to be the fact that the petitioning creditor and the petitioner are brothers. The Commissioner, behind the back of the petitioning creditor, was led to believe that the matter had been arranged, and that no opposition was intended to be offered to the bail. When he discovered the fraud which had been practised on him, and found that the bail were altogether insufficient, he formally recalled that act of his which could not in fact be valid, having been procured to be done through fraud. But for this misrepresentation, the allowance could never have been obtained, inasmuch as, by the rule adopted by the Commissioners, two days' notice must be given to the creditor before bail is tendered. [Sir *J. Cross*. Is there any thing in the act to render the observance of such a rule necessary?] It is clear, that the legislature could not have intended that the proceeding should take place, *ex parte*; and the Commissioner, who is by the terms of the statute to be satisfied with the security, may take such means as he deems necessary to satisfy his mind on the subject. [Sir *J. Cross*. That is to say, the Commissioner may decline doing what the act entitles the debtor to demand of him, unless two days' notice is given. If so, he might, if he thought fit, require twenty-one days' notice.] The fraud which has been practised is quite sufficient to invalidate the approval of the bail;

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for it has been long ago decided, that fraud will vitiate a judicial proceeding of the most solemn kind; *Duchess of Kingston's case*(a).

Mr. Bacon, in reply.

Cur. adv. vult.

June 20.

Sir JOHN CROSS. The question in this case is, whether the petitioner has committed an act of bankruptcy, within the meaning of the act for abolishing arrest.

By the 8th section of that act, it is enacted, that if any creditor, having a debt of 100*l.* owing to him by a trader, shall file an affidavit in the Court of Bankruptcy that such debt is due, and shall do certain other things, all which have in this case been done, then, unless the trader shall pay or secure the debt, or enter into a bond for the performance of certain other acts, together with two sufficient sureties, *as a Commissioner of that Court shall approve*, he shall be deemed to have committed an act of bankruptcy on the 22nd day after service of notice upon him of the filing of such affidavit. Now it appears, that such notice was served on the petitioner on the 3rd day of May; and it is agreed, that the 24th of May was the twenty-second day on which the petitioner was liable to be deemed to have committed an act of bankruptcy, in default of performing the requisites of the statute. But, on the preceding day, the petitioner had with two sureties actually entered into the bond required, and produced the same together with an affidavit of justification, as of bail in an action of law; and the Commissioner then and there approved the bond, and indorsed his approval and name thereon. And the bond was then on the same,

(a) 20 Howell's State Trials, 538.

that is, the twenty-first, day, delivered to the solicitor for the creditor. But two days afterwards, that is, on the twenty-fourth day, an exception was taken on the part of the creditor to the sufficiency of the sureties; and, on hearing the exception, the Commissioner disapproved of the bond, and cancelled the indorsement of his approval. And the default of entering into a sufficient bond, or paying or securing the debt within the appointed time, is the alleged act of bankruptcy on which the fiat is founded. Now, under these circumstances, it appears to me that the petitioner had not committed any act of bankruptcy on the twenty-second day, he having then done all that the law required; and I think, that, after the expiration of the twenty-one days, the Commissioner was *functus officio*, and it was not competent for him at any future time to revoke his approval, and thereby make an act of bankruptcy, which had otherwise no existence. I am therefore of opinion, that the petitioner has committed no act of bankruptcy in respect of the bond, and that the fiat must be annulled, and the costs paid by the petitioning creditor.

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Ex parte EDWARDS.—In the matter of AYSHFORD WISE
and others. —

THIS was a petition, praying, that the assignees might be directed to pay over to the petitioner the proceeds of two bills of exchange for 600*l.* and 400*l.*, which he claimed to be entitled to under the following circumstances. On the 28th June 1841, the petitioner applied

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A customer deposits with a banker two bills for 1000*l.*, indorsed by him, for the amount of which it was agreed he should draw, the

bankers refusing to discount them. The customer only draws for 65*l.*, and the bankers employ a broker to discount the bills, and become bankrupt in less than three weeks after they were originally deposited with them by the customer. *Held*, that the customer was entitled to the proceeds of the bills.

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to *Wise & Co.*, who were bankers, to discount the above bills; which they declined to do, but said that if the petitioner would pay them into their banking house, he might draw on the account. The petitioner accordingly paid the bills into the bankers, after previously indorsing them; and it was agreed that he should not draw out the amount of the 400*l.* bill, until the 600*l.* bill was paid. The bankers entered them as bills in their books, and not as cash. The petitioner afterwards drew two checks on the bankers for 40*l.* and 65*l.*, but the last check was paid in part by a bill for 40*l.*, which was never paid; so that the petitioner received, in fact, only 65*l.* for his 1000*l.* bills; and he had moreover an action brought against him by the holder of the 40*l.* bill, which he was obliged to settle, and pay the costs of the action. On the 16th July 1841, the bankers stopped payment; when the petitioner applied to them for his two bills, but he was told they were sent to a Mr. *Thornton Bentell*, in London, to get them discounted. It appeared, that *Bentell* sent them for the same purpose to *Saunders & Co.* of Exeter, who declined to discount them. The petitioner gave notice to *Bentell* and *Saunders & Co.*, not to part with the bills, and claiming them as his property; and he also filed a bill in Chancery against those parties and the bankrupts, to compel them to deliver up the bills, or account for the proceeds. The amount of the bills had been since received by *Saunders & Co.*, which the petitioner now claimed as against the assignees, minus the 65*l.*, together with the costs of the suit in Chancery, and of the action on the 40*l.* bill.

In answer to the allegations in the petition, it was sworn by *Baker*, one of the bankrupts, that it was not the custom of dealing of the bank, to treat any bills paid

in by a customer as short bills, but to consider all those paid in by any one as the property of the bank, and to be paid in on the customer's general account; that in keeping their accounts they had not, like many other bankers, a cash column and a bill column in their books, but that it was their practice to blend both bills and cash.

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Mr. *Bacon*, and Mr. *Follett*, in support of the petition, contended, that, as the bills were not discounted by the bankrupts, they must be considered as the property of the petitioner, within the principle of all the cases relating to short bills. The bankers had not proved, as it was incumbent on them to do, that the bills were to be considered as cash, with the knowledge of the party depositing them; *Ex parte Sargeant (a)*. It is immaterial that the petitioner indorsed them; for that would not give the bankers a right to dispose of them in the way in which they have applied them; *Ex parte Armitstead (b)*. And in one case, though the bankers charged discount on bills paid in by their customer, it was held that they had no right to negotiate them; *Ex parte Bond (c)*. In that case, the petitioner deposited India bills with her bankers, specially indorsed by her to receive the amount when due; the balance of the petitioner's banking account, exclusive of the amount of the bills, being then in her favour, and continuing so up to the bankruptcy of the bankers; the bankers charged discount on their bills in their account with the petitioner, who might have drawn on them for the amount, it being the custom of the bankers to consider ordinary bills so deposited as cash; the bankers paid the bills away to a creditor, with whom the assignees afterwards settled

(a) 1 Rose, 153. (b) 2 G. & J. 371. (c) 1 Mont. Deac. & D. 10.

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an account, charging him with the amount of the bills, and receiving from him a balance due to the estate; and it was held, that the petitioner was entitled to be reimbursed the whole amount of the bills from the assignees. The present case is not so strong as that; and, as there is here nothing to shew that the bankers were authorized by the petitioner to deal with the bills as their own, the assignees of the bankers are accountable for the proceeds; *Jombart v. Woollett (a)*. Then, the Court will not forget, that, in less than three weeks after the bankrupts obtained possession of these bills, they stopped payment, having thought proper in the mean time to dispose of the bills, for which, though amounting to 1000*l.*, the petitioner had only received the value of 65*l.*

Mr. *Anderdon*, and Mr. *Keene*, for the assignees. The question is put on a wrong ground by the other side, the point to be determined by the Court is, not whether the property in the bills passed to the bankrupts, but whether the bankrupts had power to dispose of the bills. The present case is distinguishable from all the cases that have been cited. In those cases there had been a balance in the hands of the bankers. In *Ex parte Armitstead*, for instance, it is specifically stated, that there was a cash balance in favour of *Armitstead*. But, in this case, there was no cash balance at all. For what purpose were the bills indorsed, but to enable the bankers to deal with them as they thought fit? The petitioner was enabled to draw on the bankers for the amount of these bills, in the same manner precisely as if cash to that amount had been paid into the bank. He has drawn on them, and cannot now be allowed to say,

(a) 2 Myl. & Cr. 389.

that the bills were merely deposited to receive the amount when due. Was the petitioner to be permitted to draw on the bankers for the amount of the bills, and were they to be prevented from making use of them for the purpose of providing themselves with funds to pay the petitioner's drafts? With respect to what has been said about the bankers stopping payment so soon after the bills were delivered to them, there is no such evidence of their insolvency, as to make it a fraud on their part to have received the bills from the petitioner. [Sir *John Cross*. Had the bankers authority to negotiate the bills, —unless you can prove that the petitioner said to them, “Although you will not discount the bills, you may nevertheless dispose of them as your property?”] We submit, that the bankrupts had such an implied authority, from all the circumstances of the case. In *Ex parte Bond (a)*, your Honour said, “Did the petitioner draw out any money, after the deposit of these bills? That would shew, whether they were paid in as cash, or were merely deposited to present, when due.” Now, in this case, there is no evidence of any other banking account between the parties than on these two bills; the bills themselves were the foundation of the banking account. The petitioner, on the credit of these bills, and these alone, opens an account with the bankers; and *Baker* states in his affidavit, that it was not the custom of the bank to treat any bills paid in as short bills, nor to have a cash column and a bill column in their books, but to blend both bills and cash in one account.

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Mr. *Cameron* appeared for *Suunders & Co.*

Sir JOHN CROSS. The main question for the Court

(a) 1 Mont. Deac. & D. 13.

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to decide is, to whom did these two bills belong? Were they the property of the petitioner, or of the bankrupts? It appears, that on the 28th June the petitioner applied to the bankers to discount the bills, which they declined to do, but said that he might draw on them, if he would deposit the bills with them. The bills were accordingly delivered to the bankers, to be held by them as a security for any sum which he might draw for. Under these circumstances, it seems to me, that the petitioner did not part with his property in the bills. It is stated by *Baker* in his affidavit, that although the bankers refused to discount the bills, the petitioner might draw on them at once for the full amount. But, was it possible that his drafts would have been honoured, when the bankrupts were then in a state of insolvency? A subtle distinction has been drawn between an actual transfer of property in the bills, and an authority of the bankers to deal with them as their own; and it has been contended, that the last may exist, without the first. But, unless the petitioner parted with his property in the bills, the bankers could have no authority whatever to deal with them as their own. I think, therefore, that the bills were the property of the petitioner, when he left them with the bankrupts, and still continued his property, when they thought proper to dispose of them; and that, as *Bentall's* lien has been satisfied, the proceeds of the bills belong to the petitioner.

The ORDER was, that the petitioner was entitled to receive the sum of 935*l.* from *Saunders & Co.*, after deducting their costs in the chancery suit; and that the balance of the 1000*l.* should be paid by *Saunders & Co.* to the assignees, on pay-

ment by the assignees of *Saunders & Co.*'s costs of this application. The assignees to pay the costs of this petition, but not the costs of the suit in chancery or at law.

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Ex parte RORIE.—In the matter of COPLESTONE. —

Serjeants' Inn,
June 7.

THIS was the petition of a creditor to prove for the sum of 188*l.*, the proof for which had been rejected by the Commissioner, on the ground of the debt being barred by the Statute of Limitations, and being founded on a voluntary judgment. It appeared, that the petitioner had proved another debt for 175*l.* under the fiat; and that the debt, the proof for which was rejected, was contracted before the 30th March 1832, on which day the bankrupt, without the knowledge or privity of the petitioner, executed a warrant of attorney to confess judgment in favour of the petitioner for the sum of 200*l.*, and caused judgment to be entered up, and execution issued on such warrant of attorney; under which, after payment of all costs, a sum of 12*l.* only was recovered by the bankrupt's solicitor. The solicitor then informed the petitioner, that this was intended "to protect the bankrupt's effects, and to secure the petitioner." The petitioner alleged, that this was the only information he ever received of the warrant, judgment, or execution, and that he stated to the solicitor, in answer, that he was willing to take a dividend with the other creditors. Shortly after these transactions, the bankrupt took the benefit of the Insolvent Act, and inserted the above debt in his schedule, and also stated, contrary to the fact, that

Although a creditor, whose debt has been inserted in the schedule of a party taking the benefit of the Insolvent Debtors' Act, is not prevented from proving for the balance of his debt under a subsequent fiat against the insolvent, yet where the debt is founded on a warrant of attorney given by the insolvent, and a judgment thereon entered up by him, in fraud of his creditors, the creditor cannot then prove for the balance under a subsequent fiat.

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the petitioner had sold the goods under the execution. The petitioner at first applied to prove for the 188*l.*, as a simple contract debt, which was rejected by the Commissioner; and he made a second application, claiming to prove on the judgment, which was also rejected, on the ground that the judgment was voluntary.

Mr. *Anderdon*, in support of the petition. The warrant of attorney in this case was given for a good consideration. And, if any objection is to be made to the right of proof, on the ground that the bankrupt has taken the benefit of the Insolvent Act, and has inserted the above debt in his schedule, that objection cannot be allowed to prevail; for it has been decided, that a creditor, under such circumstances, may prove for the balance due to him under a subsequent fiat issued against his debtor, and is entitled to receive dividends, *pari passu*, with the other creditors of the bankrupt, without any reference to the sources from which the whole divisible fund is derived; *Ex parte Fenwick* (a). [Sir *John Cross*. The question is here, not whether a judgment creditor, whose debt is inserted in an insolvent's schedule, can sue out execution on his judgment, but whether the judgment is not evidence of the debt.] A scheduled creditor of an insolvent debtor can not only prove his debt under a subsequent fiat, but he may even sue out a fiat as petitioning creditor against the insolvent; *Ex parte Barrington* (b). There is nothing in the Insolvent Debtors' Act, to prevent a party from pursuing his remedy in bankruptcy.

Mr. *Webster*, *contra*. No scheduled creditor under

(a) 2 Deac. 27.

(b) 2 Mont. & A. 255.

an insolvency can prove under a subsequent fiat, unless he has done all that he can to receive his debt under the insolvency. But a judgment, void under the Insolvent Act, cannot be treated as a valid judgment under a fiat. All that is decided by the cases referred to is, that the circumstance of a creditor availing himself of the Insolvent Debtors' Act does not destroy the debt; but those decisions do not apply to the circumstances of this case. Here, the warrant of attorney was void, under the provisions of the Insolvent Debtors' Act. By the 32nd section of that act, 7 Geo. 4. c. 57., if any party, who takes the benefit of the act, shall, within three months before the commencement of his imprisonment, or with the view of petitioning for his discharge, being then in insolvent circumstances, voluntarily convey, assign, or make over any property or security, to or in trust for any creditor, every such conveyance or assignment is declared to be void, as against the assignees of the party. And it has been decided, that a warrant of attorney given to a particular creditor, by one who at the time intended to take the benefit of the Insolvent Debtors' Act, is a charge on property, or a transfer of it by assignment, within the 7 Geo. 4. c. 57.; *Sharpe v. Thomas* (a); and that the statute applies to assignments made at any time previous to the imprisonment, with the view of petitioning the Court for a discharge, and not merely to such as are made within three months before the commencement of such imprisonment; *Becke v. Smith* (b).

Mr. *Anderdon*, in reply.

Cur. ad. vult.

(a) 6 Bing. 416.

(b) 2 Mees. & W. 191.

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Sir JOHN CROSS. The petitioner claims to be a creditor for two debts, one of 175*l.* which has been admitted, and another for 188*l.* which has been rejected by the Commissioners, as being barred by the Statute of Limitations. The petitioner states, that the debt in question was contracted prior to the 30th March 1832; that on that day the bankrupt, without the knowledge or privity of the petitioner, executed a warrant of attorney to confess judgment in favour of the petitioner for the sum of 200*l.*, including the said debt; and that the bankrupt caused judgment to be entered up and execution sued out, under which, after payment of expenses and other charges, a sum of 12*l.* was recovered by the bankrupt's solicitor employed in that transaction. That the solicitor then by letter informed the petitioner, that all this had been done "to protect the bankrupt's effects, and to secure the petitioner." And the petitioner says, that such letter was the only intimation he ever received of the warrant, judgment, or execution; and that in answer to that letter he merely stated, that he was willing to take a dividend with the other creditors; but he does not suggest that he made any objection to what had been done. That, shortly afterwards, the bankrupt took the benefit of the Insolvent Debtors' Act, and inserted the debt in his schedule, and also stated, contrary to the fact, that the petitioner had sold the goods under the execution. The petitioner at first tendered his claim for this as a simple contract debt, but it was rejected as being barred by the statute. And the petitioner states, that, having afterwards recollected the judgment, he applied to the Commissioners again to have it allowed as a judgment debt, but they again rejected it. In support of the petition, it was contended that this is a

judgment debt, and, as such, not barred by the statute. But it appears to me, that the judgment was entered up by the bankrupt for his own purposes, in fraud of his creditors, and that, although the petitioner might nevertheless avail himself of it as against the bankrupt, he cannot avail himself of it in competition with the creditors, whom it was intended to defraud, and that the debt is barred by the statute. I am therefore of opinion, that the Commissioners did right in rejecting the proof, and that this petition must be dismissed with costs.

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Ex parte WALTERS.—In the matter of HAND.—

THIS was the petition of a creditor to stay the allowance of the bankrupt's certificate, on the ground that he had not properly accounted for monies received by him after he became bankrupt, and that there was an irregularity in obtaining the signatures of the Commissioners. It appeared that the bankrupt, since his bankruptcy, had been employed as a surveyor in valuing tithes, and that the money he earned by this employment, which it was not proved was more than sufficient for the decent maintenance of himself and his family, he had not paid over or accounted for to his assignees. It was alleged also in the petition, that the bankrupt, on the 16th April 1842, procured the signatures of only two of the Commissioners, and that they afterwards sent it to the third Commissioner, who signed and sealed it apart from the two others; that there was no memorandum filed on the proceedings of the execution of the certificate by the Commissioners; and that there had been no list of the

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It is no objection to the allowance of the bankrupt's certificate, that he has received money since his bankruptcy, as a surveyor for valuing tithes, which he has not accounted for to his assignees; such money being considered as the fruits of his personal labour.

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creditors exhibited to the Commissioners, to enable them to ascertain whether a sufficient number of creditors, who had proved debts to the amount of 20*l.*, had signed the certificate.

Mr. *Bacon* was in support of the petition.

Mr. *Jenkins*, *contra*, contended that the money received by the bankrupt was merely the fruits of his personal labour, and that he was not therefore bound to account to his assignees for any money which he had thus earned.

Sir JOHN CROSS. It is not stated, that a sufficient number of creditors in number and value have not signed the certificate; and it is not usual for the Commissioners to allow it, until they are satisfied that the requisite number of creditors have signed it. I must take it for granted, therefore, that the Commissioners would not have signed it, unless they were perfectly satisfied of that fact. As to the money which the bankrupt received for his services as a surveyor in the valuation of tithes, I am of opinion, that such monies were received by him in respect of his personal labour, and that he was therefore not liable to account for them to his assignees. And I do not think that there is sufficient weight in the other objections, to justify a creditor in thus opposing the allowance of the bankrupt's certificate.

Petition dismissed, with costs (*a*).

(a) See *Evans v. Brown*, 1 Esp. 70; *Webb v. Ward*, 7 T. R. 296; *Crofton v. Poole*, 1 B. & Adol. 568; 1 Dec. B. L. 551.

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Ex parte GEORGE THOMAS ROBERT REYNAL and others.

—In the matter of FREDERICK GYE and RICHARD HUGHES. —

*Serjeants' Inn,
June 8.*

THIS was a petition of creditors to reverse an Order of a Commissioner of the Court of Bankruptcy for the reduction of a proof.

By indenture of mortgage, dated the 27th November 1826, and made between the bankrupts of the one part, and the petitioners of the other part, the bankrupts covenanted to surrender to the use of the petitioners certain copyhold premises, called Vauxhall Gardens, for securing the sum of 7000*l.* and interest; and the bankrupts jointly and severally covenanted to pay the mortgage money and interest. There was also a proviso, that if, after any default in the payment of an half year's interest for more than one calendar month after the same should become due, the petitioners should require payment of the principal and interest, and the same should not be paid within the space of six calendar months, the petitioners might then sell and dispose of the property.

By another indenture, dated the 28th November 1826, the bankrupts executed a similar mortgage to the petitioners, for securing to them the payment of the further sum of 7000*l.* and interest; and on the 29th November 1826, the bankrupts also executed another indenture in all respects similar to the two others, for securing the further sum of 8000*l.* and interest.

At the times of executing these several indentures of mortgage, the bankrupts also executed their joint and several bonds to the petitioners for the respective principal sums therein mentioned. And, shortly after the execution of the several mortgage securities, the bank-

The petitioners, being equitable mortgagees of certain property of the bankrupts, obtained the usual Order for the sale of the property, with liberty to bid, and to prove for any deficiency. They also held the joint and several bonds of the bankrupts for the payment of the mortgage money. The petitioners obtained the usual Order in the case of an equitable mortgage, with liberty to bid, and prove for any deficiency; and the estate was sold to one of the petitioners, for a sum amounting nearly to the whole debt. *Held*, that the petitioners could not, under these circumstances, prove against the separate estates on the bonds for the full amount of the debt, but only for the deficiency unsatisfied by the proceeds of the sale.

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rupts made a conditional surrender of the property to the petitioners.

On the 5th of June 1840 a joint fiat in bankruptcy was issued against *Gye* and *Hughes*.

On the 21st July 1840 the petitioners obtained an Order of the Court of Review, declaring them to be equitable mortgagees of the property in question, and directing a reference to the Commissioner to take an account of the principal and interest due to the petitioners in respect of their several securities, and that the property should be sold, with liberty for the petitioners to bid at the sale. And in case the Commissioner should find that any part of the property was claimed by the assignees, either as part of the present estate of the bankrupts, or as being in their possession, order, or disposition at the time of their bankruptcy, the Commissioner was to state that fact, and keep a distinct account of the monies arising from the sale of the property so claimed. There were then the usual directions as to the proceeds of the sale, with liberty for the petitioners to prove for any deficiency, reserving further directions, with liberty for either of the parties to apply.

The Commissioners certified, that there were due to the petitioners three several sums of 7156*l.* 6*s.* 8*d.* 7243*l.* 16*s.* 8*d.*, and 7331*l.* 6*s.* 8*d.*; and that the assignees claimed to be entitled to all the fixtures upon the mortgaged premises; but the Commissioner decided that the same were not any part of the personal estate of the bankrupts, nor goods or chattels, within the statute relating to bankrupts, to which the assignees were entitled, as being in the possession, order, or disposition of the bankrupts at the time of their bankruptcy, and that the mortgagees were entitled to the same.

On the 9th September 1841 the property was sold by auction, when *William Fowler*, one of the mortgagees, became the purchaser of it, for the sum of 20,200*l.*, and of certain moveable buildings and machinery for the sum of 1000*l.*, and paid a deposit of 2020*l.* into the hands of the auctioneer. But no part of the deposit, or of the residue of the purchase money, had been paid to them, nor had any conveyance yet been made by the assignees to the purchaser.

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* The petitioners alleged, that, the debts due to them from the bankrupts being several, as well as joint, the petitioners on the 29th January 1842 proved their several debts upon the respective separate estates of the bankrupts; when the assignees obtained time from the Commissioner to apply to the Court of Review to expunge or reduce such proof. The assignees, however, had since declined to contest the same. But the petitioning creditor had applied to the Commissioner to reduce the proofs, on the ground that by the terms of the above Order the petitioners had elected to prove against the separate estates, not for the whole amount of their respective debts, but for the balances only which might be due to them after they should have received their several portions of the produce of the mortgaged premises; the petitioners, on the other hand, contending that they had a right to prove for the whole amount against the separate estates, and that for whatever should remain unpaid of their debts, after receipt of the dividends on their proof, they would have a right to resort to their respective mortgage securities. The Commissioner, however, directed that the petitioners had, by the above Order, elected to prove for the balance only,

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and not for the full amount of their respective debts, and ordered the proofs to be reduced.

The prayer was, that the Order of the Commissioner might be rescinded, and that the proofs should be restored.

Mr. *Archbold*, and Mr. *Bacon*, in support of the petition. The petitioners had three joint debts owing from the bankrupts, and a joint and several bond from the bankrupts for each of such debts. The petitioners had therefore a right to prove, either against the joint estate, or the separate estates. The former petition, which prayed to have the estate sold, and to prove for the deficiency, was founded on the several indentures of mortgage, not on the bonds; and we submit that the petitioners have a right to avail themselves of the Order on that petition, and also to prove against the separate estates on the joint and several bonds. The petitioners do not seek to prove against the joint estate, in respect of which they obtained an order, but only against the separate estates. The Commissioner founded his judgment upon *Ex parte Davenport* (a); but the decision in that case does not apply to this; for, according to the argument in that case (as reported in p. 319), the creditors applied to prove against the joint estate of the three partners, on a joint debt of the three; and, after treating the security there given as the security of the three, the petitioners wanted also to treat it as the separate security of the two. There are here distinct securities, and it is immaterial in what order they are realized by the petitioners. Even treating the separate securities as the liabilities of

(a) 1 Mont. Deac. & D. 313.

sureties only, they would still be liable for any deficiency to the amount of 20s. in the pound. The petitioners do not seek to prove against the separate estates, under the Order of sale; but they went before the Commissioners to make their rights available, in the shape of separate proof upon separate securities; and they had a right to do so, till they had realized 20s. in the pound on the amount of their debts. We admit, that they cannot receive more; but this does not affect their right of proof. The petition does not ask to disturb the former Order in the slightest degree; and as the Commissioner has reduced the proof on the sole authority of *Ex parte Davenport*, we submit that his decision is erroneous, and cannot be sustained.

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Sir JOHN CROSS. In this case, the petitioners claim under a mortgage, which was made to them by the bankrupts, of Vauxhall Gardens, to secure several debts contracted with them by the bankrupts, to the amount, in the whole, of 22,000*l*. To secure these several debts, the bankrupts executed three several indentures of mortgage, and also three joint and several bonds; but each mortgage and bond were for one and the same debt. The petitioners came here two years ago, praying for an Order—I use their own terms—to be declared equitable mortgagees of the property in question, and that the property might be sold, and the proceeds be paid to them, in reduction of their debt, with liberty to prove for any deficiency. The estate has accordingly been sold, and the proceeds of the sale amount to more than 20,000*l*., which is ready to be paid over to the petitioners. The petitioners, however, decline to touch a farthing of

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this money, and want to go before the Commissioner, and swear, what is true in fact, but not in substance, that they are still creditors for 22,000*l*. The Commissioner was taken by surprise in the first instance, but he afterwards adjusted the proof, according to the terms of the Order. And now, after one of these petitioners has actually become the purchaser of the estate, they want to make oath before the Commissioner that the whole debt is still due. This appears to me a most unreasonable proposition, and I can therefore make no other Order than for the dismissal of this petition.

Petition dismissed, with costs.

Serjeants' Inn,  
June 8.

The mate of a vessel, hired by the master, who was also one of the owners, at certain wages, is a servant, within the meaning of the 48th section of the 6 *Geo.* 4. c. 16., and is consequently entitled to six months' wages, upon the bankruptcy of the master of the vessel.

Ex parte HOMBORG.—In the matter of HUDSON. —

THIS was the petition of the mate of a ship, of which the bankrupt had been master and part owner, to be allowed six months' wages, under the 6 *Geo.* 4. c. 16. s. 48. It appeared that the petitioner had been hired by the bankrupt, under a verbal agreement, in the year 1829, and that his service ceased in 1830. The fiat was issued in 1833, and the petitioner had proved for 270*l*., being the whole amount of the wages due to him.

Mr. *Charnock*, in support of the petition.

Mr. *Keene*, *contra*. The question is, whether the petitioner is a servant or clerk of the bankrupt, within the meaning of the 48th section of the act of parliament.

He was not a servant or clerk of the captain of the vessel, in particular, but he was engaged on behalf of the owners, generally; and he had no right to demand his wages individually of the bankrupt. His proof, also, which has been made under the fiat, is inconsistent with this petition. The proof is for "work and labour," generally, not as a servant. The hiring by the bankrupt was merely as the master of the vessel; and the petitioner would have been himself the master, if any accident had happened to the captain. There is no contract in writing between the bankrupt and the petitioner, which has rendered the bankrupt separately liable to the petitioner. The petitioner cannot be called the hired servant of the bankrupt; and he has lain by several years before he thought proper to make this claim.

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Sir JOHN CROSS. As to the delay that has taken place in bringing forward this claim of the petitioner, his employment as a seaman on long and distant voyages may in some degree account for that. It seems to me, that the petitioner must be considered as the servant of the bankrupt, within the meaning of the 48th section. He was hired at certain wages by the bankrupt, who was not only the master, but also one of the owners of the vessel. I do not know of any actual case of a seaman being held to be a servant, within the meaning of the act of parliament; but, as he is hired to render his services for certain wages, and is bound to obey the orders of the master of the vessel who hired him, I think that he is as much a servant, as the clerk or shopman of any merchant or tradesman. I am therefore of opinion, that the petitioner is entitled to be paid the amount of six months' wages, and that his proof must be reduced to

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that amount. The costs of both parties may be paid out of the estate.

ORDER as prayed (a).

(a) See *Ex parte Humphreys*, 3 Deac. & C. 114; *Ex parte Gough*, Id. 189; *Ex parte Skinner*, Id. 332; *Ex parte Collier*, 2 Mont. & A. 29; 4 Deac. & C. 520; *Ex parte Saunders*, 2 Mont. & A. 684; 2 Deac. 40; *Ex parte Gee*, Mont. & C. 99; 3 Deac. 341, 563; and 5 & 6 Vict. c. 122. ss. 28, 29.

Ex parte EDWARD SCHOLEFIELD.—In the matter of  
EDWARD SCHOLEFIELD. —

*Serjeants' Inn,*  
June 15.

The bankrupt, being indicted for a conspiracy to obtain goods by false pretences, swore that he was innocent of the charge, and that if he was convicted, the estate would be greatly damaged, as the prosecutor would be enabled to prove for a large sum under the fiat; he therefore applied for an Order that his assignees might advance him 100*l.*, to defend himself against the indictment; to which application one of the assignees objected, and the two others merely expressed their willingness to submit to any Order of the Court. Held, that such an Order could not be made, without the consent of all the assignees.

THIS was a petition of the bankrupt, praying that his assignees might be at liberty to advance him a sufficient sum of money to defend himself from an indictment for a conspiracy, under the following circumstances, as stated by him in his petition. On the 14th January 1840, the fiat issued; and at a dividend meeting on the 27th May 1840, *Raleigh & Co.* applied to prove for the sum of 1180*l.*, but were only admitted to claim for that sum; and a dividend of 8*s.* in the pound was declared upon the sum of 7391*l.* 6*s.* 9*d.*, the amount of debts proved and claimed. The amount of such dividend on the claim of *Raleigh & Co.* was 472*l.*, which was reserved for them in the event of their substantiating their claim into a proof; and in that case there would be a surplus of 135*l.* 19*s.* 9*d.* remaining after payment of the dividend.

On the 28th August 1841, the petitioner obtained his certificate of conformity.

At the London sittings after Easter term, 1840, the

*Held*, that such an Order could not be made, without the consent of all

bankrupt was, with two other persons, convicted on the trial of an indictment for a conspiracy to defraud *Raleigh & Co.* of certain goods; and the claim of *Raleigh & Co.* to prove for the sum of 1180*l.* was made immediately after such conviction, and in respect of the matters contained in the indictment.

On the 30th May 1840, the bankrupt obtained a rule nisi for a new trial; and in Michaelmas term 1841, the rule was made absolute, on the ground that the evidence against the defendants was not satisfactory, and that the petitioner might have an opportunity of producing and proving a certain letter from Manchester in contradiction of such evidence. The prosecutors had since given the bankrupt notice of trial, and the indictment would probably be tried in a few days.

The petitioner alleged that he was entirely innocent of the imputed conspiracy, and was confident of obtaining an acquittal, if he could be properly defended, but that he had no means whatever of defraying any part of the expenses of his defence. That if he should be acquitted upon the indictment, his *bonâ fide* and real creditors who had proved their debts would be materially benefited, as the dividend upon their debts would be thereby increased from 8*s.*, which had been already paid, to at least 10*s.*, and the bankrupt himself would thereby become entitled, under the statute, to an allowance out of his estate. That the petitioner had applied to the assignees to advance a sufficient sum out of the monies in their hands, realized from his estate, to enable him to defend himself by counsel, and to procure the attendance of witnesses on the approaching trial; but the assignees declined to do so, without the sanction of the Court. And the petitioner finally alleged, that if the

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verdict should be in his favour, the prosecutors could not maintain their claim.

The petition first came before the Court on the 7th March last, when two of the assignees appeared by counsel to submit to any Order which the Court might think proper to make; and on that occasion the Court directed, that the sum of 100*l.* might be paid to the bankrupt for the purpose mentioned in his petition, if the assignees consented to make him such advance. But this Order was countermanded on an objection raised by the third assignee, who stated in his affidavit, that the solicitor on the former proceeding was not authorized by him to consent to the application. The bankrupt therefore presented a fresh petition, and the case came on again for hearing.

Mr. *Elderton*, in support of the petition. Where issues have been directed by the Court of Chancery, that Court has in some instances made similar Orders to that now prayed for. In *Gregg v. Taylor* (a), where certain persons (who were paupers) were found by the Master to be next of kin to an intestate, and were named defendants in an issue directed to try the rights of others, the Court allowed an advance of 500*l.* to defray the expense of the trial of the issue. Here, the bankrupt is indicted for a conspiracy in fraudulently obtaining the prosecutor's goods, and if he is convicted, they will be able to substantiate their proof for 479*l.* It is quite clear, therefore, that if the indictment is successful, the bankrupt's estate will be damnified to that amount.

Mr. *Bacon*, for the dissenting assignee. The affida-

(a) 4 Russ. 279.

vit, which alleges that it will be for the benefit of the estate that the bankrupt should defend himself against this indictment, is made by his solicitor, not by either of the assignees. After the reservation of the dividend on the amount of the claim of *Raleigh & Co.*, there is no great surplus in the hands of the assignees; so that if 100*l.* is now taken from that small balance, and given to the bankrupt, there will be only 35*l.* left to pay all the costs which may be incurred by the assignees. One of the two assignees, who consent to this application on the part of the bankrupt, has been a bankrupt, and the other is the official assignee.

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Mr. *Keene*, who appeared for the two other assignees, said that they were willing to submit to any Order of the Court, but that he was not authorized by them to consent to the application.

Mr. *Elderton*, in reply. If the Court is satisfied that it will be for the benefit of the estate to make this Order, it does not require the express consent of the assignees for that purpose.

Sir JOHN CROSS. When this petition was previously before the Court, the Court was given to understand that the assignees consented to the application; and accordingly an Order was made, that the assignees might advance the 100*l.* to the bankrupt, if they chose to do so. The Court would never have made such an Order, without the consent of all the assignees. Now one of the assignees swears, that the solicitor on the former proceeding was not authorized by him to consent to the application; he now positively objects to it; and although



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the two other assignees appear, they nevertheless withhold their consent, being willing, however, to submit to any Order of the Court. My opinion is, that I ought not to adjudicate upon this matter, without the consent of all the assignees, and that the petitioner cannot call upon the Court to compel the assignees to do what is required.

Petition dismissed; costs of the assignees to be paid out of the estate.



Ex parte JAMES HERON.—In the matter of JOHN  
BROOKES. —

Serjeants' Inn,  
June 15.

The Court will decline making any Order on the assignees for the payment of the bankrupt's allowance, until the amount is ascertained by the Commissioners.

THIS was the petition of an assignee under a second fiat, claiming the amount of the bankrupt's allowance payable to him under the former fiat. It appeared, that the first fiat had issued against *Brookes* and three other persons who were his partners, and that the amount of *Brookes's* property was 10,000*l.* more than any of the other partners. The first dividend was declared on the 2nd March 1835, and the second on the 22nd February 1837; the separate estate of *Brookes* had paid 20*s.* in the pound, and the joint estate 13*s.* 4*d.* in the pound; and it was alleged in the petition that there would be no further dividend, and that the sum of 317*l.* remained in the hands of the assignees to pay the allowance. Previous to the first bankruptcy, the bankrupt had commenced two chancery suits, to which the assignees were made parties, and he was also the plaintiff in a suit in America, which was still pending. The second fiat issued on the 11th March 1837, before which time the

bankrupt never applied for his allowance to the assignees under the first fiat.

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Mr. *Anderdon*, and Mr. *Rogers*, in support of the petition, relied on *Ex parte Minchin* (a), where it was held, that if A., one of three partners, pay 20s. in the pound on his separate estate, and 12s. 6d. be paid on the joint estate, but on the separate estates of the two other partners a sufficient dividend has not been paid, A. is nevertheless entitled, for his sole use, to an allowance of 5l. per cent., not exceeding 400l. This decision was brought under the notice of the Lord Chancellor in *Ex parte Gibbs* (b), and though he was at first inclined to differ from the judgment of the Vice-Chancellor, yet, upon further consideration, he said that he had looked at the words of the act, and found them so precise and strong, that he thought each partner was entitled to his full allowance. The words of the 129th section are, "that in all joint commissions under which any partner shall have obtained his certificate, if a sufficient dividend shall have been paid upon the joint estate and upon the separate estate of such partner, he shall be entitled to his allowance, although his other partner or partners may not be entitled to any allowance." [Sir *John Cross*. The stronger words, upon which no doubt Lord *Lyndhurst* relied, are contained in the preceding section, the 128th, which says, "that every bankrupt who shall have obtained his certificate," if the net produce of his estate shall pay the requisite amount, "shall be allowed" so much out of such produce.] It is objected on the other side, that there are outstanding law suits, in which the assignees are concerned, and that the last dividend was

(a) Mont. &amp; Mac. 135.

(b) Mont. 105.

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not declared to be a final dividend. But it is no reason, because the assignees engage in litigation, that the bankrupt is not to have his allowance, when a sufficient sum is already divided amongst his creditors; nor is it any reason, because the word "final" is not inserted in the order of dividend, that the dividend is to be considered less final. In the case already cited of *Ex parte Gibbs*, the objection was raised, but was waived as untenable, of the claim for the allowance being made before a final dividend was declared. And in *Ex parte Cooper (a)*, this Court held that it was not necessary that the word "final" should be used in the order of dividend, if it appear from the state of the proceedings, and the mode in which the declaration of dividend is made, that it was intended to be final; and that a dividend may be sufficiently final to entitle the bankrupt to his allowance, though it may not be final for the purpose of preventing subsequently accruing property from being distributed.

Mr. *Kenyon Parker*, for the assignees. The petitioner ought to have shown that the last dividend was a final dividend, or intended to be a final dividend, and that there was some Order of the Commissioners on the proceedings declaring the bankrupt entitled to a certain allowance, before he can sustain a petition for it to this Court. The 129th section of the 6 Geo. 4. c. 16. merely declares that one of several partners may receive his allowance, although the others may not be entitled to it. And with respect to the case of *Ex parte Minchin (b)*, which has been relied on by the other side, the marginal note of that case expressly states, that "the allowance

(a) 2 Mont. & A. 689; 2 Deac. 41.

(b) Mont. & M. 135.

of the certificate is not payable, until a final dividend has been made." The petitioner alleges, it is true, that there will be no further dividend; but the evidence contradicts this; as it is admitted that there is a large sum still remaining in the hands of the assignees. In *Ex parte Surridge (a)*, the question, whether a bankrupt was entitled to claim his allowance before a final dividend had been made, was again submitted to the Court, and the Vice-Chancellor, after referring to what he had stated in *Ex parte Minchin*, decided, that, according to the authorities, and what appeared to be the uniform practice of the Court, the bankrupt could not claim any allowance until after a final dividend had been made; because, before that time, and so long as other creditors were at liberty to prove, it would be impossible to ascertain correctly to what allowance the bankrupt was entitled. [Sir John Cross. It seems to me, that in *Minchin's* case, the Vice-Chancellor, in speaking of a *final* dividend, meant a *second* dividend.] It is sworn, that previous to the first bankruptcy the bankrupts commenced a suit in America, which is still pending, as well as two chancery suits in this country, to which the assignees have been made parties; so that the present case comes within the exception of the 109th section of the 6 Geo. 4. c. 16., which declares that the second dividend shall not be final, if any action at law, or suit in equity, be depending, or any part of the estate be standing out not sold or disposed of. In the report of *Ex parte Cooper (b)*, in the second volume of Deacon's Reports, it is stated that the Court made the Order for the bankrupt's allowance, because it appeared that it was *intended* to be a final dividend; and therefore that the bankrupt ought not to

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(a) Mont. & M. 287.

(b) 2 Deac. 41.

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have been prejudiced by the omission of the word "final" in the order of dividend. The Chief Judge in that case says, that the bankrupt is not entitled to his allowance even after a second dividend, if it was really not intended to be final, notwithstanding the statute declares it shall be final, except under certain circumstances; and that the question was, whether the dividend was advertized and declared in such a manner, as to make it apparent that a final dividend was actually intended. No application for any allowance was ever made by the bankrupt to the assignees under the first fiat, before the issuing of the second fiat.

Sir JOHN CROSS. The material question is this: supposing the bankrupt to have been entitled to his allowance under the first fiat, whether his conduct does not amount to an acquiescence in what the assignees now propose to do with the fund remaining in their hands. The order for the second dividend was made in 1837, and the second fiat was not issued for nearly a month after the dividend order, the bankrupt in the mean time never making any application for his allowance. Moreover, how can I order the 317*l.* to be paid to this bankrupt, when the three others are equally entitled to their allowance out of this sum?

Mr. *Anderdon*, in reply. The principle, on which the acquiescence of a party is inferred, is not merely on the negative ground of non-claim, but there must be some positive act of the party appearing, to show his acquiescence. The suits, that have been mentioned to be still pending, relate to the estates of the other bankrupts, and not to the estate of *Brookes*, who has no interest what-

ever in the result of those proceedings. There has been a sufficient dividend paid under the joint estate, as well as under the separate estate of *Brookes*, to entitle the latter to his allowance; and there is nothing whatever said in the statute about a final dividend, as being the condition precedent to the claim of the bankrupt's allowance. In *Ex parte Lomas* (a), where the assignees distributed a sum without any order of dividend, and the bankrupt subsequently obtained his certificate, it was held that he was as much entitled to his allowance, as if they still had that sum in their hands.

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Sir JOHN CROSS. The question is not now, whether the bankrupt is entitled to any allowance under the first fiat; because it is distinctly admitted that he is. But the matter stands thus: five years ago the Commissioners made a second dividend, and proceeded to audit the accounts of the assignees. In doing so, they ought also to have taken into their consideration the right of the bankrupt to his allowance; for they did not then question, that the bankrupt might have a claim to his allowance. It seems clear, that the intention of the assignees was, that the bankrupt's allowance should not be ascertained then, but should stand over for a future day, to abide the ulterior order of the Commissioner. Now the assignees are by the present petition called on to pay a sum of money for the bankrupt's allowance, which has never in fact been allowed to the bankrupt by the Commissioner under the first fiat. I cannot order a sum to be paid to the bankrupt for his allowance, which has not been previously ascertained by the Commissioner. There is shortly, as I am informed, to be an audit

(a) 1 Mont. & A. 437; 3 Deac. & C. 681.

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meeting, at which the Commissioner will of course ascertain the amount of the funds remaining in the hands of the assignees, and in what manner they ought to be applied, in regard to the bankrupt's allowance. All these are matters of calculation, which belong exclusively to the Commissioners. I wish therefore to put matters in such a train, as, without depriving the bankrupt of his allowance, will not interfere with the duties of the Commissioner; as it would be desirable that he should calculate the amount of the allowance at the next meeting.

The ORDER was, that it should be referred to the Commissioner to inquire and ascertain what the bankrupt ought to be allowed out of the net proceeds of his estate under the former fiat; reserving further directions and costs, with liberty for the other bankrupts under that fiat to go before the Commissioner and substantiate any claims for their allowance to which they may be entitled, in the judgment of the Commissioner.

Ex parte FLETCHER.—In the matter of HUMBER-  
STONE.—

Serjeants' Inn,  
June 16.

An Order to substitute a petitioning creditor's debt was amended, for the purpose of stating that the creditor (applying to have his debt substituted) had proved a sufficient debt, before making the application. See the next case.

THIS was the petition of a creditor, praying the Court to amend an Order which had been made in this case for substituting the debt of the petitioner for the petitioning creditor's debt, under the 6 Geo. 4. c. 16. s. 18. In an action brought by the assignees in the Court of Common Pleas, that Court decided that the Order was defective, on the authority of *Christie v. Unwin* (a); because it

(a) 11 Adol. & E. 373.

did not state, that the creditor applying to have his debt substituted had proved a sufficient debt under the fiat, before making the application. The object, therefore, of this petition, was to have a statement to that effect inserted in the Order.

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Mr. *Bacon*, in support of the petition.

Sir JOHN CROSS (upon reference to Mr. *Barber*, the registrar,) said, that the Order, which was decided to be bad in *Christie v. Unwin*, was drawn up in the same form that had prevailed ever since the passing of the 6 Geo. 4. c. 16. ; and that he always understood, that the Courts of Westminster Hall had in these cases acted upon the principle laid down by Mr. Justice Buller in *Rex v. The Aire and Calder Navigation* (*a*), in which he says, "The distinction between orders of justices and special verdicts has been long established; in the latter, where it concludes generally, the whole case must appear upon the record; but the very reverse is the case which obtains in the case of orders of justices; for the Court will intend every thing to be right, which does not appear to be otherwise, and they will not entertain any doubt upon a subject upon which the justices did not." It is our duty, however, to amend the Order, in deference to the opinions of the Courts of King's Bench and Common Pleas.

ORDER to be amended, as prayed (*b*).

(*a*) 2 T. R. 666.

(*b*) See *Ex parte Hall*, 1 Mont. Deac. & D. 219, note (*b*).





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Ex parte MOLYNEUX.—In the matter of HUMBER-  
STONE.—

Serjeants' Inn,  
June 16.

A creditor having obtained an Order to substitute his own debt for that of the petitioning creditor, and having applied afterwards to the Court to amend the Order, which proved defective through a clerical slip of the officer in drawing it up, the defendant in a pending action petitioned against the amendment, or if such should be directed, that the original Order might not be dated prior to the Order of amendment. Held, that the Court ought not to entertain such an application.

THIS was the petition of the defendant in a pending action brought by the assignees, praying that the Court would not make any alteration in the Order to substitute, as prayed in the last case, or if it did make any such alteration, that the Order might be dated as of to-day, so that the defendant in the action might not be prejudiced by the alteration.

Mr. *Anderdon*, in support of the petition. The affidavit of the petitioner in the last case does not state that the debt to be substituted was incurred not anterior to the debt of the petitioning creditor.

Sir JOHN CROSS. The original petition stated that the debt was not anterior, the affidavit in support of that petition stated as much, and the Order of this Court made on that petition also stated the fact.

Mr. *Anderdon*, and Mr. *Crompton*, in support of the petition, referred to *Muskett v. Drummond* (a), where it was held that an Order made by the Lord Chancellor under the 6 Geo. 4. c. 16. s. 18. was invalid, for not finding, or calling upon the Commissioners to find, that the original petitioning creditor's debt was insufficient. In that case Mr. Justice *Bayley* says, "It does not appear that the Lord Chancellor was apprised, when he made the Order, of the existence of the present suit, so as to call his attention to the propriety of making any provision as to giving it in evidence in this suit. No

(a) 10 B. & C. 153.

notice of the application to the Lord Chancellor appears to have been given to the defendant, against whom the suit was pending, so as to give him an opportunity of interposing in the Court of Chancery, to prevent its being improperly used to his prejudice." The Court did not give any express opinion in that case, whether a valid Order of the Lord Chancellor, under the above-mentioned act, would support a commission of bankrupt by reference in an action already commenced; but the indication of the opinion of the Court, from the wording of Mr. Justice *Bayley's* judgment, certainly appeared to be, that such an Order would not operate upon a depending suit, especially against a party who had no notice of such Order, and was not apprised that he would have to meet the substituted debt. We submit, therefore, that if the Court thinks proper to amend the Order in this case, it should be without prejudice to the pending action, as was done in *Ex parte Watson*(a); where the Court said, that "as the action has gone so far as plea, and the defendant has depended upon the invalidity of the petitioning creditor's debt, it would be unjust to him to make an Order to substitute a new petitioning creditor's debt, without adding "without prejudice to the action." If the Court does not direct these words to be inserted, it is submitted, that the Order to substitute should be dated to-day, and not bear date on the day when the invalid Order was made,—otherwise it will be the same as antedating the present Order, and giving it a retrospective operation, which Lord *Cottenham* refused to do in the matter of *Harper*(b), saying, that "the Court cannot

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(a) 3 Mont. &amp; A. 609; 3 Deac. 310.


(b) 1 Mont. Deac. &amp; D. 239.

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remedy the particular inconvenience by a departure from a general rule, which might affect other parties."

Sir JOHN CROSS. So long ago as the 5th of May 1839, this creditor applied to the Court to substitute his own debt for that of the petitioning creditor, which had been found insufficient to support the fiat; and the Court then said, that he was entitled to such Order. This Court being bound, *ex debito justitiæ*, to give him a valid Order, the officer of the Court happens to draw up an Order which turns out to be defective; and the creditor now comes here and says, "You did not give me the right Order, to which I was entitled on the former occasion." What is the Court then to do upon such an intimation of a party, who has been wronged, not by his own error, but by that of the Court? Why, of course, to give him now the proper Order, which he ought to have obtained on the 5th of May 1839. But now comes another party to ask the Court to undo what it has already done, by rescinding altogether the former Order, and making the original Order as of to day. That I think would be doing gross injustice to the creditor, who obtained the former Order. Who is the present petitioner, that urges the Court to adopt such a proceeding? The very defendant in the pending action, who wishes to take advantage of a clerical slip, which he contends must stand as it does for his benefit. I am of opinion that it would be both unreasonable and unjust to listen to such an application, and, therefore, that this petition ought to be dismissed.



Ex parte EMILY ANN BIRCH.—In the matter of EMILY  
ANN BIRCH.—

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*Serjeants' Inn,  
June 16 and  
July 18.*

THIS was the petition of the bankrupt to annul the fiat, impeaching the validity of the trading, act of bankruptcy, and the petitioning creditor's debt.

The bankrupt kept a boarding and lodging house, in Bedford Place, providing meat and victuals to her lodgers, and occasionally supplying them with wine. On the 28th February 1842 all the bankrupt's goods and furniture were seized under an execution at the suit of an attorney of this name of *King*, who stated that he had at different times lent the bankrupt money to the amount of nearly 2000*l.*; and the following day *King* put a fresh execution into her house, at the suit of one *Dorcas Phillips*, for the sum of 500*l.* The proceeds of the sales under these executions realized 2400*l.*; which sum had been paid into Court, and awaited the result of legal proceedings under the Interpleader Act, to test the validity of the executions. It appeared from the affidavits in opposition, that notwithstanding *King* had put these executions into the bankrupt's house, he was on very intimate terms with her, and dined with her several times during the week after the executions issued. On the 24th February, only four days before the issuing of the first execution, the bankrupt called at a silversmith's, and ordered numerous articles of plate, together with a ring and a brooch, amounting in the whole to 240*l.* These articles were delivered at the bankrupt's house on the 26th of February. On the previous 30th of November she gave an order for thirty-two dozen of wine, which was also delivered to her; and shortly afterwards she gave orders to other wine mer-

A person who keeps a boarding and lodging house, in which the lodgers take their meals at her own table, and who occasionally supplies them with wine which she purchases of a wine-merchant, is a trader, within the 6 Geo. 4. c. 16. s. 2., as the keeper of a hotel.

A party who orders large quantities of goods of different tradesmen, without the means of payment, and after they are delivered secretly leaves her house in London, without leaving word where she is to be found, and goes into obscure lodgings at Reading, must be taken to depart from her dwelling-house with intent to delay her creditors, and thereby commits an act of bankruptcy.

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chants for nearly 300*l.* worth more of wine ; and, in the interval between the 1st October 1841 and the 1st March 1842, the value of the goods she ordered of different tradesmen amounted to the sum of 3600*l.* On the 19th February 1842 the bankrupt left home early in the morning, and stayed away all day, and returned at night. On the 24th February, after dark, a large quantity of boxes and packages were secretly removed. On Sunday the 27th February the bankrupt informed her maid-servant, that she was going into the country for some time, and would have no longer occasion for her services, that the servant's wages would be paid during her absence, but that she need not inquire by whom they were paid. On the Thursday following, the 3d March, she left her house, and never returned to it, and her servant did not know where she had gone. Between the 1st and 7th March several creditors called, and were told that the bankrupt was from home.

On the 7th March the fiat issued, in which the bankrupt was described as " a lodging-house keeper, dealer, and chapwoman." The debts were considerable, besides those to the amount of 3600*l.*, which the bankrupt had incurred between the 1st October and the 1st March, and the only assets consisted of a few articles of property seized by the messenger at her lodgings in Reading, and a claim for 12*l.* 10*s.* due from one *Charlotte Seaton*, whose residence had not been discovered.

The bankrupt made an affidavit, stating, that the persons who came to lodge at her house paid a certain sum for board and lodging ; that they had their meals at her own table ; and that she only let one or two of her lodgers have some wine upon a few occasions, when they wanted it, to prevent them from sending for it to a

coffee-house; that she left her house on the 3d of March, because all her furniture was seized under the executions, and she had not a bed to lie on; that she ordered a board to be put in front of the house directing her letters to be sent to a certain house in Great Russell Street, Bloomsbury; and that she gave no orders to be denied to any creditors.

In reply to the bankrupt's affidavit, it was sworn that on the 30th November 1841, when she wrote a letter to a wine-merchant ordering thirty-two dozen of wine, she stated that "she did not intend to drink it all herself, but that she had those in her house who would consume most of it;" and that in a bill she sent in afterwards to one of her lodgers, there was a charge for several bottles of wine.

Mr. *Anderdon*, in support of the petition, called on the counsel on the other side to maintain the affirmative of the issue, namely, that the bankrupt was a trader, and had committed an act of bankruptcy.

Mr. *Bacon*, and Mr. *James*, *contrà*. The bankrupt, in this case, was a trader, within the meaning of the 6 *Geo.* 4. c. 16. s. 2., which declares that all "victuallers, keepers of inns, taverns, hotels, or coffee-houses," shall be deemed traders, and liable to become bankrupt. In *Smith v. Scott* (a), it was decided that the keeper of a private lodging house, who also sought a profit by furnishing her guests with provisions, was subject to the bankrupt laws as an hotel keeper, although the provisions were set apart as the separate property of each guest. A distinction may be taken between a mere lodging-

(a) 9 Bing. 14.

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house keeper, and one that boards his lodgers; and that distinction has been recognized by this Court (a). But, in this case, the lodgers of the bankrupt were found board, as well as lodging, by the bankrupt, and agreed to pay a certain sum for that accommodation, in addition to the price of the lodgings. So much as to the trading.

With respect to the act of bankruptcy, it is clear from the evidence, that the bankrupt departed from her dwelling-house, with intent to delay her creditors. Some of her goods were secretly made away with; she goes into the country, without making any provision for the payment of her debts; several creditors call in her absence; and she abruptly discharges her servants, without giving them a month's warning. There is every reason to believe, from the frequent conferences between the bankrupt and *King*, the execution creditor, and the quantity of goods she ordered of different tradesmen so recently before the issuing of the fiat, that the whole scheme was a contrivance to pay the execution creditor, and that this petition is, in reality, the petition of *King*, and not that of the bankrupt.

Mr. *Anderdon*, and Mr. *Keene*, in support of the petition. We submit that a boarding-house keeper like the bankrupt is not such a trader, as was contemplated by the act of parliament. None of the words of the 2nd section can by any possibility be made to apply to the bankrupt, except the words "keepers of hotels," and those words cannot include within their meaning a lady, who permits her lodgers to board at her own table. This was not an open house, like an inn or hotel, which any person has a right to enter, and order what he wants to eat or drink. The bankrupt swears that she never

(a) See *Ex parte Bowers*, 2 Deac. 99.

supplied any wine to her guests, except on a very few occasions; and one solitary act of dealing, it has been decided, is not sufficient to prove the trading, unless coupled with evidence of a general intention to trade; *Ex parte Wilkes (a)*. In *Smith v. Scott (b)*, which has been relied on by the other side, the Court said, that a lodging-house keeper must be brought within the description of a hotel keeper, to be made a bankrupt; and that this could only be done, where the party sought her livelihood by a profit on the provisions she furnished to her guests.

In regard to the act of bankruptcy,—there is no pretence for saying that she committed one on the 3rd of March, when she expressly states that she was advised to leave her house, on account of all her goods being seized under the executions. There is no evidence of any orders given by her to be denied to any creditor; and, before she quitted her house, she gave directions for a board to be put up, informing those who called where her letters were to be sent, and where, of course, she could easily be heard of.

The bankrupt states also, that if she ever was a trader, she had ceased to be so when the petitioning creditor's debt accrued; for, when the bills which he held fell due, all her lodgers had left her house; but we do not so much rely on this objection.

Sir JOHN CROSS. The points which the Court has to determine in this case are, whether there exists any proof of the trading, and of the act of bankruptcy; the point relative to the petitioning creditor's debt having been all but abandoned by the counsel in support of the petition; which, however intended to serve the interests

(a) 2 Mont. & A. 667; 2 Deac. 1.

(b) 9 Bing. 14.

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of third parties, is presented in the name of the bankrupt. First, with regard to the trading,—the facts appear to be, that the bankrupt kept a boarding and lodging house, contracting with various parties to board as well as lodge them, and to supply them for this purpose with certain necessary articles. She was in the habit, as appears from the evidence, of purchasing large quantities of wine, for the purpose of supplying her establishment; and in a letter which she wrote to a wine merchant, accounting for an order for so large a quantity as thirty-two dozen, she said that “she did not mean to drink it all herself, but that she had those in her house who did drink much of it” This quantity, though amounting in value to 79*l.*, was not considered enough; accordingly, orders were given to other wine merchants for nearly 300*l.* worth more; and yet it is now contended by the petitioner’s counsel, that this was only for the private use of her own family, consisting of three females. There can be no doubt whatever, that part of the wine was bought for the use of her lodgers; though there is great reason to believe that the greater portion of it was not procured for their accommodation, but for the purpose of being swallowed up in the intended execution of her friend, Mr. *King*. There is, however, sufficient evidence of carrying on a business by buying and selling, part of the wine being purchased and paid for by her lodgers.

As to the petitioning creditor’s debt, it has been urged, that, though of sufficient amount, it was not contracted by the bankrupt until after the trading had ceased; but there is nothing to show this; and indeed the trading appears to have been carried on up to the time of the bankrupt quitting her house. It cannot be denied that there was a dealing on the 30th November, when she

ordered the thirty-two dozen of wine; for the debt was contracted in reality for the supply of her stock in trade, and in the bill she sent in to one of her lodgers, at the end of the year, there is a charge for several bottles of wine.

I come then to the act of bankruptcy. The question is, with what intent she quitted her residence in Bedford Place, and went to live in lodgings at Reading. Did she go there to be out of the way of her creditors, or not? In the course of a few months, debts to the enormous amount of above 3000*l.* were contracted with various tradesmen, whose goods were left in the house for the purpose of meeting the execution. Only a day or two before her departure, plate and jewels to the value of 220*l.* were also laid in, just in time to be swept away by the levy. It was not convenient to the bankrupt, under such circumstances, to remain in Bedford Place, where she could not stand the complaints of so many creditors, with whom she had thus dishonestly contracted these debts; she had, therefore, good reason to go to Reading, where she had previously secured a retreat. She went away secretly, leaving no notice where she was to be found, and all appeared to have been done in concert with her friend, Mr. *King*, who sued out the execution for the purpose of recovering a debt of nearly 2000*l.*, alleged to have been contracted by her since the death of her husband, who died insolvent, leaving her utterly destitute. Yet this individual, it is pretended, lent her large sums, without security or interest, until the whole amounted to 1500*l.*, for which he took a note, and a memorandum promising a bill of sale and a life insurance. For two years after this, nothing was done by the debtor, but more money was lent by the creditor, who more-

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over allowed his debtor to receive unquestioned a legacy of 300*l*. There was another execution also, for a sum of 500*l*., alleged to be due to one *Dorcas Phillips*, but who or what she was, or if in existence, was not known. These two executions were levied by Mr. *King* on the effects, when this woman had gone away to avoid her creditors. There is no pretence whatever to support this petition for annulling the fiat, which appears to be in all respects perfectly valid; but if there were any such pretence, I should not be induced, under all the circumstances, to annul a fiat thus issued. The petition must therefore be dismissed; and if it had appeared by evidence, at whose instigation the petition had been presented, the costs should have been decreed against that party. The Court will not, however, give costs against the bankrupt, as it is contrary to the general rule, and would in the present instance be quite useless.

Petition dismissed.

Registrar's  
Office.  
June 30.

Ex parte BURT.—

Where a party had been summoned to attend the registrar, on a matter which had been referred to him by the Court, and, after being examined, was arrested near the outer door of the registrar's office, he was ordered to be discharged; but without costs against the officer, as he would not undertake to bring no action for false imprisonment.

THIS was an application of a party to be discharged from an arrest made upon him, after attending a summons before the registrar to be examined as a witness on a matter referred to him by the Court of Review. On the 26th July 1841, the Court made an Order that certain matters mentioned in a petition should be referred to the registrar for inquiry, with power to examine witnesses, &c. On the 28th of the present month the

against the officer, as he would not undertake to bring no action for false imprisonment.

party attended before the registrar, in pursuance of a summons previously served on him; when, after being examined some time, his examination was adjourned by the registrar to a future day; and he had hardly closed the outer door in leaving the registrar's office, before he was arrested. He stated in his affidavit, that he showed his summons to the officer, but the arrest was persisted in.

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Mr. *Keene*, in support of the application, now moved that the party should be discharged, and that the sheriff should pay the costs, and cited *Ex parte Byne*, in the matter of *Bryant* (a), where a party was arrested while attending a meeting of Commissioners, in order to tender his evidence upon an inquiry depending before them; and upon a motion for his discharge, Lord *Eldon* was of opinion, that the want of a summons, or a subpoena, ought not to deprive a witness, actually in attendance for the purpose of giving evidence, of that privilege which, upon common law principles, and for the objects of justice, he was entitled to, and that during such attendance and returning he was protected; and Lord *Eldon* accordingly ordered him to be discharged, at the expense of the creditor. The present is a stronger case for a discharge; for here the party was duly summoned before the registrar.

Mr. *Anderdon*, *contrà*, admitted that the party was entitled to his discharge, but submitted that it ought not to be with costs against the officer. An alteration was made in the summons, not by the registrar, but by some one else, by inserting the day to which the examination

(a) 1 Ves. & B. 316; 1 Rose, 451.

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 Ex parte
 Bean.

was adjourned, in the place of the original day specified therein. It is doubtful, therefore, whether this was a valid summons. The bailiff who arrested the applicant offered to accompany him back to the registrar, to know whether the summons was correct, and whether the alteration was made with his authority; but this the applicant refused to do. In *Ex parte Byne*, the Order for the discharge of the party was made on the creditor in the first instance, and if the party was not discharged, then on the officer. Under all the circumstances, it is submitted that the Order ought to be without costs. In a similar case which occurred in this Court, *Ex parte Britten (a)*, the Court did not order the officer to pay costs.

Sir JOHN CROSS. If the facts were as stated by the officer's counsel, they might induce the Court so to qualify the Order; but this statement is at variance with the evidence of the other side. The officer has subjected himself to an action for an illegal arrest, as he was informed of the summons, and still persevered in arresting the party. He has therefore made himself liable, not only to an action, but to a commitment for contempt; and ought, I think, to pay the costs; provided the applicant will undertake not to bring an action against him.

Mr. Keene having stated to the Court, that the applicant would not consent to give such an undertaking,

The ORDER was made for the discharge of the party, without costs against the officer.

(a) 1 Mont. Deac. & D. 278.

1842.

Serjeants' Inn,
July 11.

Ex parte MUDIE.—In the matter of JAMES.—

THIS was the petition of a creditor, in the nature of a petition for rehearing a former petition, which had been presented by him for proof of a debt. The former petition was heard on the 24th of January last, when it was ordered to be dismissed with costs. The commission against the bankrupt issued so long ago as the year 1823.

Where a petition has been dismissed, with costs, the petitioner cannot have it reheard, until he pays the costs, notwithstanding there has been no actual demand on him for the payment.

Mr. *Anderdon*, and Mr. *Hallett*, were in support of the petition.

Mr. *Green*, *contra*, objected to the hearing of this petition, as the costs of the former one had not yet been paid by the petitioner. The present is an amended petition, stating new facts. In *Ex parte Munk* (a), where the former petition of a bankrupt was dismissed on the merits, with costs to be paid by him, and he continued in contempt for non-payment of the costs, it was held that he had no *locus standi* in Court, upon the presentation of another petition, the object of which was precisely the same.

Mr. *Anderdon*. Costs, which are not taxed and not demanded, are not payable. To support an objection to the hearing of a petition, on the ground of the costs not having been paid by the petitioner, as directed by a former Order, there must have been a personal demand of the costs; otherwise the party is not in contempt; *Ex parte Wyatt* (b). In the present case, the assignees who oppose this petition are themselves in default; for

(a) 2 Deac. & C. 120.

(b) 3 Deac. & C. 665.

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Ex parte
Muniz.

although the Order on the hearing of the former petition was made on the 24th of January last, they have never yet made any demand for the costs, nor even when the present petition was actually set down for hearing at the last bankruptcy sittings. If they had proceeded with more diligence, the petitioner would then have been in a better situation to pay the costs. *Ex parte Munk*, which has been cited by the other side, was decided under very special circumstances; the petition for rehearing in that case having been vexatiously presented.

Mr. Green. The costs have been taxed in this case; and the assignees were not bound to make the objection as to their non-payment when the petition was set down, but when it is called on for hearing. Besides, it appears that the petition was set down by mistake at the former sittings.

Sir JOHN CROSS. Under the actual circumstances attending this case, the time for hearing the petition has never arrived until the present moment. It seems, that the petition was erroneously set down at the former sittings of the Court; but it is now regularly called on for hearing. This, therefore, is the proper time to object that the petitioner has not complied with the former Order, by which he was directed to pay the costs. I do not see why the Court should depart from its regular practice, in favour of this petitioner. This commission, it appears, issued as long as nineteen years ago, and the petitioner, after this length of time, now applies to prove a debt. It cannot therefore be a prejudice to him, that this petition should stand over to a future day. I think that the costs of the former peti-

tion ought to be paid, before this petition can be heard ; the time for which of course depends entirely on the petitioner.

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Ex parte
MUDIE.

In the matter of CAMPION.—

Serjeants' Inn,
July 11.

MR. *Anderdon* applied to the Court for an Order that a petition, which was about to be presented for next Monday, the 18th instant, might be put into the paper for hearing on that day.

No order as to the hearing can be made on a petition not yet presented.

Sir JOHN CROSS. The Court cannot make an Order on a petition not yet presented. When the petition is duly lodged in the office, the Court will probably make the Order you wish.

Ex parte WILLIAM MAGNAY and ALEXANDER ROGERS.

—In the matter of HENRY THOMAS AUSTEN, HENRY MAUNDE, and JAMES TILSON.—

Serjeants' Inn,
July 11.

THIS was the petition of the sheriffs of London, praying that the accountant in bankruptcy might be ordered, out of the money standing in his name in the Bank of England, as part of the estate of the above bankrupts, that the bankrupt was entitled to a sum standing in the name of the accountant in bankruptcy, in the books of the Bank of England, that the accountant held the money in trust for the bankrupt, and that the sheriffs had seized such money. On this return the Court of Exchequer made an Order, that the sheriffs should pay over to the prosecutor of the extent the amount of his debt. On a petition by the sheriffs to the Court of Review to order this money to be paid over to them by the accountant in bankruptcy: *Held*, that the finding of the inquisition, and the sheriffs' return, were alike erroneous, and the Court therefore refused to make any such Order.

To a writ of extent in aid against a bankrupt, sued out long after the issuing of the commission, the sheriff returns

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Ex parte
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and another.

to pay to the petitioners the sum of 1826*l.* 13*s.* 5*d.*, together with sheriffs' poundage and officers' fees, according to the directions of a certain writ of extent, and an Order made thereon of the Court of Exchequer.

The petitioner stated, that *Henry Thomas Austen*, one of the bankrupts, was Receiver General of Taxes for the County of Oxford, and at the time of the issuing of the Commission, which was so long ago as the 16th March 1816, the bankrupts were found, by an inquisition on a writ of extent then issued, to be indebted to the crown in 22,743*l.* 8*s.* 10*d.* *Edward Knight* and *Mary Austen* were sureties for *Henry Thomas Austen*, and at their instance an extent in aid was also issued against the bankrupts, which was indorsed to levy 1826*l.* 13*s.* 5*d.* To this last-mentioned writ the sheriffs returned, that on the 2d November 1841 they caused an inquisition to be taken, upon which it was found, that on the 18th February 1841 the bankrupts were entitled to the sum of 7057*l.* 15*s.* 8*d.*, standing in the name of *Basil Montagu*, Esq. accountant in bankruptcy, in the books of the Bank of England, under a commission of bankruptcy theretofore issued, and then in force; and that the said *B. Montagu*, as such accountant, held the said money in trust for the bankrupts, which said sum the sheriffs returned, that they had seized into the hands of our Lady the Queen. On the 4th November 1841, notice of this inquisition and return was given to the accountant in bankruptcy, and also to the official assignee. On the 18th November the prosecutors of the extent obtained an order of the Court of Exchequer, that the sheriffs should, on or before the 30th November, out of the above-mentioned sum of 7057*l.* 15*s.* 8*d.*, pay to *Edward Knight* and *Mary Austen*, the prosecutors of the extent,

the sum of 1826*l.* 13*s.* 5*d.* On the 24th November, the sheriffs made an application to Mr. *Montagu*, the accountant in bankruptcy, to pay over to them this last-mentioned sum, which he declined to do, without the order of the Lord Chancellor, or the Court of Review. The sum of 7057*l.* 15*s.* 8*d.* was produced by the sale of certain lands in the county of Worcester, in which *Henry Maunde*, one of the bankrupts, had a reversionary interest when he became the crown's debtor.

On the 4th June 1842, the sheriffs obtained a conditional Order from the Court of Review on the above petition; but the Order was not to be acted upon for one month, to enable the assignees to take such steps as they should be advised.

On the 21st June 1842, the assignees applied to the Lord Chancellor to be permitted to proceed by petition of appeal from the above Order of the Court of Review, when his Lordship granted an Order for that purpose. On the 27th June application was made to the Lord Chancellor, that the petition of appeal might be answered for an early day, to which application his Lordship declined to give his assent, but recommended the assignees to apply to the Court of Review to stay the payment of the fund under the above Order of the Court, until an appeal could be heard against such Order. On the 29th June, the assignees accordingly applied to the Court of Review, that the payment of the money under the above order might be suspended, to enable them to have an appeal heard against such Order; when the Court directed the former Order to be suspended until the petition was reheard, as the Order had been made on the former occasion without discussion.

The petition accordingly now came on for re-hearing.

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Ex parte
MAGNAY
and another.

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and another.

Mr. *Anderdon*, and Mr. *Watson*, in support of the petition. The object of the sheriffs is to reach, by the order of the Court, a sum of money standing in the name of the accountant in bankruptcy, which was the produce of an estate belonging to one of the bankrupts, and sold by order of the assignees. The bankrupts were debtors to the crown in 1816, and as the crown extent was prior to the commission which issued in that year, it of course overrode the rights of the assignees. The whole amount which was found due to the crown has been paid, either on levies, or by the sureties, except a sum of 800*l*. But the extent was never brought into operation against the reversionary interest of *Henry Maunde* in the estate in Worcestershire; and therefore a writ of *non omittas* was afterwards issued from the Court of Exchequer, for the levy of the remaining sum of 800*l*., together with 1146*l*. for taxed costs, sheriffs' poundage, &c. The assignees had notice of the execution of the inquisition on the extent in aid, but did not think proper to attend on that occasion, when the jury found that the bankrupts were entitled to the sum of 7057*l*. 15*s*. 8*d*., standing in the name of the accountant in bankruptcy.

Sir JOHN CROSS. That was certainly an extraordinary finding by the jury. Can it be contended, that money in the Bank of England under a commission of bankrupt is money held in trust for the bankrupts? There is a second fiction in the case, that the sheriffs are said to have seized the same. You propose on behalf of the prosecutor of an extent in aid, to seize property not belonging to the bankrupts, or held for them; and you must show some authority for such a course. Where has it

ever been decided, that a sheriff may seize property *in custodia legis*?

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Mr. *Anderdon*. The Court perhaps will look with some indulgence upon the awkward situation in which the sheriffs are placed. If they moved in the Court of Exchequer for an attachment against the accountant in bankruptcy, they would offend this Court; and if they do not, they will be liable to pay the amount of the sum found by the inquisition out of their own pockets.

Sir JOHN CROSS. The question is, whether, in conformity with the process of the Court of Exchequer for the relief of the sheriffs, whose proceedings appear to have been erroneous, this Court is bound to make an Order to arrest the money in the hands of its officer. You want to import a judgment of one Court upon the funds of another. I would suggest, that the parties, who claim this money under the Order of the Court of Exchequer, should petition this Court in a regular way, stating their claim on the fund in question.

Mr. *Anderdon*. Those parties, *Knight* and *Austen*, the prosecutors of the extent in aid, will not petition. They are adverse parties to the sheriffs, and have already got an attachment against them in the Court of Exchequer. This Court, it is submitted, is bound either to make the Order now prayed for, or permit the sheriffs to proceed personally against the accountant in bankruptcy; for the Court has already by its own solemn act sanctioned the claim of the petitioners, by giving them a conditional Order in this petition.

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*Ex parte  
 Money  
 and another.*

*Mr. Kenyon Parker, and Mr. Rogers, contra*, were stopped by the Court.

Sir JOHN CROSS. The petitioners, in this case, call on the Court to do an act, which is wholly unprecedented; and I am not prepared to comply with their request,—especially when I see that the claim on the fund in question is founded on a misrepresentation, and when I also find that there is a right of proof for more than 1000*l.*, which has not been adjudicated on by any Court whatever. A good deal has been said of a solemn act of this Court in favour of the claim of the petitioners. But the interlocutory Order of the Court was made without any discussion; it did not recognize the right of the petitioners to take the money, but was made for the purpose of preventing the assignees from distributing the fund, until the petitioners had time to establish their rights before the Court of Exchequer, and because this Court was anxious not to do any thing which could contravene the authority of the other Court. The respondents intimated an intention of appealing to the Lord Chancellor from the former Order of this Court; and, by consent of all parties, the matter now comes before the Court in the shape of a petition for rehearing. The counsel for the petitioners has adduced no precedent for such an application; and I am of opinion, that this Court has no authority to order the accountant in bankruptcy to pay over this sum of money. How does the matter turn out, on further investigation? A writ from the Court of Exchequer is sued out, on the prosecution of *Knight and Austen*, the sureties for the bankrupt *Henry Thomas Austen*, commanding the sheriffs not only to arrest the body of the bankrupt, but to inquire

what lands and goods belonged to him or the other bankrupts; and the sheriffs return to the Court of Exchequer, that they find a sum of 7000*l.* to be in the hands of the accountant in bankruptcy, in trust for the bankrupts, and that they have seized this money. Why what could the Court of Exchequer do, upon such a return, but order the sheriffs to pay over the amount of the sum for which the extent was issued? It does not appear, that the sheriffs have made any attempt, as they might have done, to procure the parties interested in this money to interplead; neither have they shown why they did not make a special return to the Court of Exchequer. The finding under the inquiry, and the return by the sheriffs, are alike erroneous. I have already mentioned other ways in which this matter might be brought before the Court. *Knight* and *Austen*, the prosecutors of the extent in aid, might petition this Court to adjudicate on their claim; or the sheriffs, if obliged to pay the money, in pursuance of the return they have made to the Court of Exchequer, might also come here, and petition to stand in the place of *Knight* and *Austen*, with respect to any claims of those parties to the fund in question. But, as the matter now stands before the Court, I cannot say that the sheriffs are entitled to any thing; and this petition must consequently be dismissed.

Mr. *Kenyon Parker* applied for costs against the sheriffs.

Sir JOHN CROSS. I think I ought not to give costs.

Petition dismissed—Assignees to have their costs out of the estate.

1842.

Ex parte  
MAGNAY  
and another.

1842.

*Serjeants' Inn,*  
July 13.

Where two firms have one partner common to both, a debt from one firm to the other cannot be made the subject of a notice, under 1 & 2 Vict. c. 110. s. 8., for the purpose of creating an act of bankruptcy; the statute requiring such debt to be recoverable at law.

A fiat will be annulled, if sued out for a purpose foreign to that of the bankrupt laws, such as that of effecting a dissolution of a partnership; and *semble*, it is not necessary to prove that there was no other purpose.

Ex parte JOHNSON.—In the matter of JOHNSON.

THIS was the petition of the bankrupt to have the fiat annulled, for want of an act of bankruptcy, and also because the fiat had been sued out for an improper object, that of effecting the dissolution of a partnership.

The act of bankruptcy, on which the fiat was founded, was the omission to pay, or give security, according to the provisions of 1 & 2 Vict. c. 110. s. 8.; but the validity of this alleged act of bankruptcy was now disputed, on the ground that the debt on which proceedings under the act are founded, must be a legal debt, whereas it was in the present case merely an equitable demand; being, in fact, a sum due from one firm to another, and there being one partner common to both firms. The facts were as follows. One *Joseph Horner*, the younger, carried on the business of corn-miller, in partnership with his father, *Joseph Horner*, the elder, and his brother *John Jubb Horner*. He also carried on the business of tow-spinner, in partnership with the bankrupt, and there was a debt of 700*l.* claimed to be due to the former of these firms from the latter.

*Joseph Horner*, the younger, had been desirous of dissolving the partnership between himself and the bankrupt, and had made proposals to the latter with that view, which had not however been acceded to. Shortly afterwards notice was served upon the bankrupt and his partner, according to the terms of the statute, 1 & 2 Vict. c. 110. s. 8., to pay the debt of 700*l.*; and neither payment nor security being forthcoming, a separate fiat was sued out against the bankrupt alone, not by the firm to whom that debt was due, but by another firm of *Taylor, Wordsworth, Whitehead, and Pollard*, to whom the

bankrupt and his partner were also indebted; but who, it appeared, had made no application for payment till immediately before they struck the docket, nor had they taken any proceedings to recover their debt from the bankrupt's partner. It was moreover stated, that the joint assets amounted to 2000*l.*, which was sufficient for payment of all the joint debts, whereas the bankrupt's separate property would not produce 20*l.* and it was stated, that several joint debts had been paid by the bankrupt's partner, after the commencement of the proceedings on which the fiat was founded.

As further evidence of the allegation that the real object of the fiat was the dissolution of the partnership, it was stated, that in suing out the fiat, the petitioning creditors employed not their own solicitor, but one *John Shackleton*, who was the solicitor employed by the firm, consisting of the three *Horners*, in giving the notice under the act; and who had never, on any other occasion than the present one, acted as the solicitor of the petitioning creditors. A witness also deposed, that he called after the issuing of the fiat upon Mr. *Shackleton*, who then stated to him, that no fiat in bankruptcy would have been issued, if the bankrupt had consented to a dissolution of the partnership between him and *Joseph Horner*, the younger, and that if a dissolution could still be effected on the terms proposed by *Joseph Horner*, the younger, the further prosecution of the fiat would be forborne.

The bankrupt also deposed to his having mentioned his intention to take the present proceeding to annul the fiat, in the course of a conversation with Mr. *Pollard*, one of the petitioning creditors, who thereupon observed, that the bankrupt was perfectly justified in so doing, and that the result of such petition on annulling the fiat

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was perfectly immaterial to the petitioning creditors, as they were guaranteed by *Joseph Horner*, the elder, *John Jubb Horner*, and *Joseph Horner*, the younger, the payment in full of the debt due to them from the bankrupt and his partner, and from all loss, costs, or damages, attendant upon or incidental to the issuing or prosecution of the fiat.

The petitioning creditors, however, denied having stated that they were indemnified by the *Horners*, and they filed affidavits to discredit the bankrupt's testimony, and impugn his character.

Mr. *Kenyon Parker*, and Mr. *Pigott*, in support of the petition. The debt, to come within the meaning of the statute (a), and to be a good foundation of an act of bankruptcy, must be one, which might be recovered at law. This is clear from the language of the section, which, as it creates a new act of bankruptcy, must be strictly construed, and will not be satisfied by a mere equitable debt. That a debt to a partnership from one of its members is a debt of the latter description, is clearly explained in *Ex parte Hall* (b) by the Chief Judge.

But, if the validity of the act of bankruptcy could be established, still the fiat must be annulled, as being sued out for an improper object; *Ex parte Bourne* (c), and *Ex parte Christie* (d); the latter of which cases is precisely in point, the fiat having been there annulled, on the ground that it was sued for the purpose of dissolving a partnership.

(a) 1 &amp; 2 Vict. c. 110. s. 8.

(c) 2 Gl. &amp; J. 137.

(b) Mont. &amp; Chit. 479; 3 Deac. 405.

(d) 2 Deac. &amp; Ch. 482.

And if a third ground were wanting for annulling this fiat, it would be supplied by the authority of *Ex parte Budd (a)*, which was a case like the present, and where your Honour thought, as the default in payment was committed by both partners, it was the duty of the petitioning creditor to sue out a joint, and not a separate fiat.

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Sir JOHN CROSS. *Budd's* case turned on this, that the creditor who demanded the debt consented to payment being suspended over the twenty-one days, and was therefore a party to the default which was relied upon as the act of bankruptcy. So it might be a question here, whether *Joseph Horner*, the younger, one of the parties demanding the debt, did not, in his character of partner of the bankrupt, concur in the non-payment.

Mr. *Anderdon*, and Mr. *Stammers*, for the petitioning creditors. The act of bankruptcy having been committed by failure to pay, or to give security, after notice given by any creditor, it is equally competent, either for the same, or for any other creditor, to sue out a fiat upon it; and the validity of the fiat would not be affected by the conduct of the creditor, whose debt was the foundation of the act of bankruptcy, unless he were the petitioning creditor, as he was in *Ex parte Budd (a)*. The new act of bankruptcy is substituted for the old one, of lying in prison twenty-one days. But, according to the old practice, it was not necessary for the petitioning creditor to be identical with, nor would he be affected by the conduct of, the creditor at whose suit the bankrupt was in custody. [Sir *John Cross*. Could he

(a) 1 Mont. Deac. & D. 436.

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have been lying in prison under the old law at the suit of his partner?] That the bankrupt might successfully plead in abatement to an action by the three against the two, does not prevent the demand from being a legal one; for that form of defence might not have been resorted to, and if it had not been, the action would have proceeded with all its legal consequences.

And with regard to the other objections taken to the fiat, it has been decided that a commission is a legal right, *Ex parte Willbean* (a). And even if the motive assigned for the issuing of this fiat really existed, it is not proved that there was not another motive also, viz. the proper distribution of the assets.

Mr. *Kenyon Parker*, in reply, was stopped by the Court.

Sir JOHN CROSS. This is the petition of the bankrupt to annul the fiat, and, in support of it, two grounds are relied upon: First, that no act of bankruptcy has been committed; secondly, that the fiat was sued out, not for the legitimate purpose of distributing the estate and effects of the bankrupt among his creditors, but for the indirect purpose of thereby effecting a dissolution of the partnership between the bankrupt and *Joseph Horner*, the younger.

There is a great deal of conflicting evidence in this case, and when that is so, the discussion generally turns at great length upon the contradictions which any witness may have made, however minute: but I conceive it to be the duty of a judge, to examine carefully those facts which are undisputed in the case, and to see if he can discover

(a) 5 Mad. 1; Buck, 459.

the truth among these, without reference to the contradictions in the other parts of the evidence.

Now what are the undisputed facts in this case? The bankrupt was in partnership with *Joseph Horner*, the younger; and *Joseph Horner*, the younger, his partner, was also in partnership with his father, and a brother, *John Jubb Horner*. *Joseph Horner*, the younger, in his character of partner of the bankrupt, contracted a debt, as between himself and the bankrupt, on the one side, and himself and his father and brother, upon the other. About that there is no question. This was the debt upon which the affidavit was originally filed, as a groundwork for the act of bankruptcy under the statute.

Now it is contended, that *Joseph Horner*, the younger, could lawfully proceed for the debt, which he, together with *Johnson*, owed in this manner, under the 8th section of 1 & 2 Vict. c. 110., inasmuch as that section does not require the debt to be a legal one. But upon this point I think the observation of Mr. *Piggott* is conclusive, viz. that, as the act of bankruptcy is to be deemed to have been committed, if the debtor does not, within twenty-one days, pay the debt, or secure, or compound for the same, or enter into a bond to pay such sum or sums as shall be recovered in any action which shall thereafter be brought for the same, the section in which these words are used must contemplate those debts only upon which an action might be brought. Now it is admitted, that in this case no action at law could have been successfully prosecuted, unless the defendant should wilfully fail to make the adequate defence to it; and I am therefore of opinion, that the debt is not recoverable at law, and that on that ground the act of bankruptcy is insufficient.

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But I do not proceed altogether upon that ground. I proceed also upon the other objection, with reference to the object for which the fiat was issued.

It has been very strongly urged, that, in order to make this objection valid, it must appear that the petitioning creditor had no motive except that of dissolving the partnership. I cannot accede to that proposition. In all the cases in which fiats have been annulled on a similar objection, there was a petitioning creditor's debt, which would have been sufficient to support the fiat, if it had been issued for the ordinary legitimate purposes.

But what appears in evidence in this case? Why it is shown, that the partnership was to continue a few years longer, but that *Joseph Horner* and his father and brother were anxious to dissolve it; and the worse they succeeded in making out the character of *Johnson* to be, the more clearly do they show the urgency of their motives to dissolve the partnership. They knew that this would be the effect of a fiat. The object is now obtained; but has any other object been obtained by it? None that I can discover. Why should these petitioning creditors, with only the ordinary motives of a person in that situation, and having a claim against two partners, proceed only against that one who had committed an act of bankruptcy, passing by the other, who, for any thing that appears, was fully able to pay the debt? It is not alleged, that he was ever asked to pay it, or that he ever refused, or was unable to do so. I must therefore conclude, that he was perfectly competent to pay it; and there was no necessity here to sue out a fiat against *Johnson*, if the petitioning creditors' object had been merely the payment of their debt. I am therefore of opinion, that there was another object. The petitioning

creditors indeed do not deny this, when it is imputed to them; and it appears, that one of them said that he was guaranteed by *Joseph Horner* the younger; this is not denied, although it is denied that they stated themselves to have been indemnified. That however is not a denial of their being guaranteed. The same solicitor acted for *J. Horner* the younger and the petitioning creditors; and he, probably, when he had filed the affidavit of the former, knew that the deponent could not be a good petitioning creditor, on account of his being a partner, and therefore struck the docket in the name of the present petitioning creditors. He does not deny the expression imputed to him, to the effect that the fiat would never have been sued out, if *Johnson* had consented to dissolve the partnership.

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Under these circumstances, I think the Order must be as prayed by the petition, both because there was no valid act of bankruptcy, and because it has been sued out for the sole purpose of dissolving the partnership.

ORDERED accordingly.

Ex parte JOHN DOBSON.—In the matter of EDWARD SWANWICK BOULT, and THOMAS ADDISON.

Serjeants' Inn,  
July 14.

THIS was the petition of the Liverpool Albion Bank, by their public officer, to be declared mortgagees of certain railway shares, with liberty to add to their incum-

A railway act prescribes a form of instrument for the transfer of shares, and provides that a

memorial of the transfer shall be entered in the Company's books, and that until such memorial shall be made, the purchaser shall have no share in the undertaking. A shareholder in the railway borrows money on a deposit of the certificates of his shares, with assignments executed by him, but with the name of the transferee left in blank, and the blanks are not filled up before the shareholder becomes bankrupt. *Held*, that the depository had a lien on the shares, and that the lien extended to sums paid by him in respect of calls.

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brance the amount of the calls, which they had paid upon the shares, and for the usual Order for a sale.

The shares in question were forty-eight in number, of 100*l.* each, in the Great North of England Railway Company, and, according to the provisions of the Railway Act, the following was the form of instrument by which the shares were to be transferred.

"I A. B. of — in consideration of the sum of —, do hereby assign and transfer to the said C. D. — shares, numbered —, of and in the undertaking called the Great North of England Railway, to hold unto the said C. D., his executors, administrators, and assigns, subject to the several conditions on which I held the same, immediately before the execution hereof; and I the said C. D. hereby agree to accept and take the said shares, subject to the conditions aforesaid. As witness &c."

The act also provided, that on every sale the deed or assignment (being executed by the seller and the purchaser) should be kept by the clerk of the company, who was to enter in some book to be kept for that purpose a memorial of such sale or assignment, and indorse the entry of such memorial on the deed of sale or assignment; and the clerk was thereby required to make such entry and indorsement accordingly, and on demand to make an indorsement of such sale or assignment on the certificate of each share so sold, and deliver the same to the purchaser for his security; and such indorsement, being signed by such clerk, was to be considered in every respect the same as a new certificate, and until such memorial should have been made and entered as before directed, the seller thereof was to remain and be held liable for all future calls, and the purchaser was to have no part or share in the profits of

the undertaking, nor any interest in respect of such share paid to him, nor any vote in respect thereof, as a proprietor of the undertaking.

The shares were entered and registered in the name of the bankrupt *Boult* alone; and, on the 12th of June 1841, the bankrupts obtained from the bank an advance of 1400*l.*, on a deposit of the certificates, together with instruments of transfer in the above form, signed by the bankrupt *Boult*, but with the name of the transferee left in blank. Accompanying the deposit was a letter, whereby the bankrupts promised, that, if the certificates and transfers were sent to Messrs. *Prescott & Co.* in London, they would be redeemed on behalf of the bankrupts by repayment of the advance of 1400*l.* This promise not having been kept, the certificates and transfers came back to the bank, who thereupon gave notice of their lien to the secretary of the railway company. On the receipt of this notice on the 22nd of June 1841, the secretary of the railway company wrote to the bank, informing them that 2508*l.* 13*s.* 8*d.* was due in respect of calls upon the shares.

The fiat issued on the 26th of June 1841; and, on the 29th of September 1841, the bank paid the amount due in respect of calls, such payment being requisite to prevent forfeiture of the shares, which at the time would not sell in the market for as much as the debt of 1400*l.*, and the sum paid in respect of calls would amount to, together. The shares were thereupon transferred to the petitioner on behalf of the bank; but, at the date of the fiat, the blanks for the name of the transferee of the shares in the instruments of transfer had not been filled up.

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Mr. Bacon, in support of the petition. There can be no question here, except as to the amount paid in respect of the calls; and that question is one of no difficulty, inasmuch as the peculiar nature of the property gives the mortgagee no alternative but that of paying the calls or losing his security. It is like the case of a mortgagee of freehold property, who is entitled to add to his debt the expenses which are necessarily incurred in the purpose of protecting the title or in lasting improvements. So a mortgagee of renewable leaseholds, may add to his mortgage debt the expenses of procuring a renewal.

The validity of the lien cannot be disputed; for, if the transfers were complete, the bank had a legal title; but, if the transfers should be considered incomplete by reason of the blanks in the instruments, still the bank are equitable mortgagees, and this Court may order to be done whatever is requisite to perfect the title.

Mr. Crompton, and Mr. Blundell, for the assignees. The bank must make out that they are mortgagees, and then that they were authorized by the mortgagor to make the further payments in respect of calls. With regard to the first point, the only mode of acquiring any interest in the shares is, that pointed out by the act of parliament, which, in express terms, excludes persons claiming by any other title from any part or share in the profits of the undertaking. But a transfer with the name of the transferee in blank, is not in conformity with the provisions of the act, as was decided in the case of *Hibblewhite v. M'Morine* (a), upon the construction of a similar provision in the Brighton Railway Act, the judgment of the Court being given at great

(a) 6 Mee. & W. 215.

length, and after much consideration. And they referred to *Gibson v. Overbury* (a). [Sir John Cross. Could the bankrupts have disposed of the shares, while the certificates were in the hands of the bank?] Supposing they could not, the cases upon equitable mortgages have not gone so far as to say, that the effect of a deposit of documents is in every case to go beyond the interposition of difficulty, in the way of alienation of the property to which the documents relate. It has never been decided, that the deposit of the documents shall pass an interest in the property, contrary to the express provisions of an act of parliament. Besides, no notice was given to the railway company until after the act of bankruptcy had been committed, and until so short a time before the issuing the fiat, that the case cannot be said to be taken out of the 6 Geo. 4. c. 16. s. 72., which extends to these shares, they being made personal estate by the Railway Act; *Humble v. Mitchell* (b), *Ex parte Vallance* (c). If the security be valid, it is a legal mortgage, and therefore the petition must be dismissed; *Ex parte Moore* (d).

With respect to the other point,—a mortgagee, before he makes any payment for the protection of the estate, must apprise the mortgagor; *Lord Trimleston v. Hamill* (e). As to the analogy drawn from mortgagees of renewable leaseholds,—an express clause is always introduced into the mortgage deed, providing, that the expenses attending the renewal shall be added to the mortgage debt; which shews the opinion of conveyancers to be, that the security would not extend to those expenses, without a special stipulation to that effect.

(a) 7 Mees. & Wels. 555.

(d) 2 D. & C. 7.

(b) 11 Adol. & Ell. 205.

(e) 1 B. & B. 385.

(c) 3 M. & A. 224.

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Mr. *Bacon*, in reply. It is by no means clear upon the affidavits, that the act of bankruptcy was committed, before the notice was given to the secretary of the railway company; but that is not now sufficient, if it were made out; it must be shewn, that the bank had notice of the act of bankruptcy, when they gave notice of their lien.

Sir JOHN CROSS. It appears, that the bankrupts deposited with the Liverpool Albion Bank certificates of shares in the Great Northern Railway Company, according to the course of dealing between the bankrupts and the bank. The bankrupts are brokers for buying and selling railway shares, and they, or one of them, being entitled to the railway shares in question, and being in want of 1400*l.*, desired the certificates and the transfer to be taken by their clerk, and under their authority, to the bank. On the credit of that deposit of the certificates and transfer, the bank, at the request of the petitioners, advanced the sum of 1400*l.*, and were told at the same time, that if they would transmit to London to Messrs. Prescott & Co. the certificates and transfer, the money which they had advanced would be repaid on the following day. Accordingly, after lending the 1400*l.* and taking possession of the documents, the bank forwarded them to London, according to the arrangement; but, there being no sum of 1400*l.* forthcoming to meet the demand, the documents get back into the possession of the bank, and they claim a lien upon them for the sum of 1400*l.* which they have advanced. Under these circumstances, two questions have been argued; first, had the petitioners any title, as against the bankrupts themselves? And upon this question I am of opinion, that the right which the petitioners acquired in the shares

was this, that they were entitled not only to retain the documents which were deposited, but all the beneficial interest which belonged to the depositors in the shares, until the debt was paid. If therefore there were no other question, except as between the bankrupts and the petitioner, I think there is no reason to doubt, but that the petitioner is entitled to the right which he claims in the shares.

But then another and distinct question has been raised by the assignees, who say, that they are entitled to the shares by the operation of the 72nd section. It appears, however, that notice of the transfer of the shares was given to the railway company three or four days before the issuing of the fiat; and although it is not clear, whether such notice was given before the act of bankruptcy was committed, yet, inasmuch as it is not proved that the bank had notice of any such act of bankruptcy, I do not think the assignees have established any title to the shares under the 72nd section. The only other point is, with respect to the payments, which the bank have made on account of calls upon the shares. It appears, that since the bankruptcy, and at a time when the bankrupts were, as it is to be presumed, unable to pay the calls upon the shares, the bank, for the sake of preserving the property and preventing its being forfeited, paid certain calls which any owner of the shares, whether he was an assignee in bankruptcy or not, must have paid, to prevent the property from being lost. It also appears, that, if the shares are sold, the greatest part of the value of them will be the amount of payments made by the bank in the shape of calls; and I think the bank therefore are entitled to have the payments satisfied out of the produce of the shares.

ORDERED accordingly.

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*Serjeants' Inn,
July 14.*

Where parties, entitled under a will, petition for leave to prove under the bankruptcy of an executor, the assignees' costs come out of the general estate.

Ex parte JESSE BRIDGMAN, THOMAS DRYLAND, and MARTHA DRYLAND.—In the matter of JESSE BRIDGMAN and WILLIAM DRYLAND.

THIS was the petition of two legatees, under a will of which the bankrupt was executor, for an account of what was due from the bankrupt to the testator's estate, and for leave for the bankrupt, or some one else to be appointed by the Court, to prove, the dividends on the proof being paid into Court.

Mr. *Sheffield*, for the petition.

Mr. *Goldsmid*, for the assignees, who had been served with and consented to the petition, asked, that the petitioner might pay their costs.

Sir JOHN CROSS. The petitioner cannot be called on to pay the costs of the assignees, who need not have appeared, unless they thought it for the benefit of the estate so to do. The estate must bear their costs.



*Serjeants' Inn,
July 15.*

Semble, that a creditor, who has not proved before the Commissioner, may petition for the removal of an assignee; but if he do not himself, in support of his petition, make an affidavit of his debt, the petition will be dismissed with costs.

Ex parte BARNETT.—In the matter of COHEN.

THIS was the petition of a creditor, who had not proved under the fiat, but who in his petition stated, that the bankrupt was indebted to him in the sum of 200*l*. The prayer was for the removal of one of the assignees.

he do not himself, in support of his petition, make an affidavit of his debt, the petition will be dismissed with costs.

Mr. *Jeremy*, in support of the petition.

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Mr. *Anderdon*, *contrà*, took a preliminary objection, that a creditor, who had not proved, could not petition for the removal of an assignee.

Sir JOHN CROSS. This is the complaint of a person, who states, no doubt, in his affidavit in support of the petition, as he does in the petition itself, that he is a creditor of the bankrupt to the amount of 200*l*. If that be so, his debt is proved in this Court as far as is necessary for the purposes of this petition.

On referring, however, to the affidavit in support of the petition, it was found to be made not by the petitioner, but by his solicitor, whereupon

The COURT dismissed the petition with costs.



Ex parte SHERBORN.—In the matter of STAMFORD.

Serjeants' Inn,
July 16.

THIS was a petition for the substitution of a new petitioning creditor's debt; and it appeared, that, if the Order were drawn up in the form now adopted by the Court, directing the costs to be paid by the old petitioning creditor (*a*), those costs could not be recovered, as he was in insolvent circumstances; whereupon

On a petition to substitute a new petitioning creditor's debt, and on it appearing that the petitioning creditor was in insolvent circumstances, the Court ordered that if the costs could not be recovered from him, they should come out of the estate.

The COURT added to the usual Order a direction, that if the petitioner could not obtain the costs from the petitioning creditor, they should be paid out of the estate.

(*a*) See *Ex parte Ullathorne*, 1 M. D. & D. 338.

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Mr. *Bilton*, for the petition.

Mr. *R. Thomas*, for the assignees.

The petitioning creditor did not appear. The Order does not appear to have been ever drawn up.

Ex parte HUGH JAMES VARDON and others.—In the matter of ROBERT SWANSBOROUGH and HENRY OAKE, and in the matter of CHRISTOPHER ARTHUR HARRIS.—

Serjeants' Inn,
July 19 and 20.

S. and O. assign all their stock and effects to trustees, for the benefit of their creditors, and dissolve their partnership. S. continues on the same premises, and carries on a different branch of trade, and soon afterwards takes in H. as a partner. Part of the stock of S. and O., which had been assigned to trustees, was a quantity of New Zealand flax, which remained unsold upon the premises, but was separately warehoused and kept distinct from the stock of the new partnership, and

was not adapted for the new manufacture carried on by S. and H. A separate fiat was sued out against H., and six months afterwards, a joint fiat against S. and O. Held, that the assignees of S. and O. were entitled to the flax, and that the clause of order and disposition did not apply to such a state of circumstances.

THIS was a petition of the assignees of *Swansborough* and *Oake*, praying to rescind an Order of the Commissioner, and that it might be declared that a quantity of New Zealand flax was the property of *Swansborough* and *Oake*, at the time of their bankruptcy.

The petition stated, that, previously to the year 1836, *Swansborough* and *Oake* carried on business in partnership together, as preparers and dressers of New Zealand flax, at Grimsby, in Lincolnshire, under the firm of the Patent Perennial Flax Company. The business was carried on upon premises demised to them for twelve years from the 13th June 1835, at the rent of 160*l.*, in which was contained a covenant not to use the premises for any other purpose than a manufactory for preparing perennial and other flax, without the consent in writing of the lessor, one *George Harris*; and no other flax was used by them than New Zealand flax.

At the latter end of 1836, *Swansborough* and *Oake*, being involved in difficulties, called a meeting of their creditors; when they ceased carrying on business together, and three of their creditors were appointed trustees for the purpose of winding up their affairs, in the same manner as if administered under a fiat in bankruptcy; and an agreement to this effect was drawn up and signed by most of their creditors, but no deed of assignment was actually executed. The partnership between *Swansborough* and *Oake* was dissolved, as from the 31st December 1836; but notice of such dissolution was not published in the Gazette, until the 19th May 1837. *Swansborough*, then, thinking that he should be able to carry on to advantage the business of a Baltic flax spinner upon the premises at Grimsby, the trustees granted him permission to do so, upon condition of his paying them the sum of 1500*l.*, for the buildings and machinery; that being the sum at which the same were valued in the balance sheet, submitted by *Swansborough* and *Oake* at the meeting of their creditors. The petition alleged, that, in pursuance of this agreement, *Swansborough* adapted the premises and machinery at Grimsby to the spinning of Baltic flax, at an expense of 4500*l.*; and that, for the purpose of paying the sum of 1500*l.* to the trustees, an arrangement was entered into with a Mr. *Abbott*, who was a creditor of *Swansborough* to the amount of 1500*l.*, by which it was agreed, that, if the trustees should be able to wind up his affairs, the dividends payable to him should be applied, so far as the same would extend, in payment to the trustees of the 1500*l.* As, however, the trustees were unable to wind up the affairs of *Swansborough*, no dividend was ever declared of his estate, and no part of the 1500*l.* was ever paid to the trustees.

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Part of the stock in trade of *Swansborough* and *Oake*, which was included in the above-mentioned balance sheet, was a quantity of New Zealand flax, part of which was at Grimsby, and part at Barnsley; but this was not included in the arrangement between the trustees and *Swansborough*. The petition alleged, that the new business undertaken by *Swansborough*, that of spinning Baltic flax, was totally different from that of manufacturing and preparing New Zealand flax, which could not be used in the new business, as it injured the machinery; but the tow or refuse of such flax could be used, and some of such tow was accordingly used by *Swansborough*, with the permission of the trustees.

The new business was carried on by *Swansborough* alone, from the beginning of 1837 until January 1838, when he entered into partnership with the bankrupt, *C. A. Harris*, the terms of which were put into writing; but no articles of partnership were ever executed. By these terms the business was still to be carried on in *Swansborough's* own name; *Swansborough* was to have two-thirds of the profits, and *Harris* one-third; and the capital was to consist of 6000*l.*, of which 4000*l.* was to be considered as already brought in by *Swansborough*, as the value of the premises and machinery at Grimsby, and 2000*l.* in cash was to be brought in by *Harris*. The petition alleged, that the New Zealand flax, which was left upon the premises at Grimsby, was never intended to be, and in fact was not included in *Swansborough's* share of the capital, but that, on the contrary, the same was separately warehoused and kept distinct from the stock in trade of the partnership. Some time after the formation of the partnership, more capital being required for carrying on the business, *Harris* agreed to bring in the further sum of

2000*l.*, and thereupon his share was increased to one-half. *Harris* never interfered in the management of the business, nor was known as a partner to any person but one, who supplied the partnership with goods. *Oake*, the former partner of *Swansborough*, it was also alleged, never knew of the existence of any partnership between *Swansborough* and *Harris*.

On the 29th April, 1839, a fiat in bankruptcy was issued against *Harris*.

In June 1839, an account was taken of the stock of *Swansborough* on the premises at Grimsby, at which the messenger under the fiat against *Harris* assisted; but the messenger never in any manner interfered with *Swansborough* in carrying on his business, and while at Grimsby resided altogether on the premises of another person against whom a fiat had issued; and *Swansborough* continued to have the sole control, order, and disposition of the machinery and stock in trade, until his bankruptcy. The New Zealand flax on the premises was also, until that period, insured in the joint names of *Swansborough* and *Oake*; the premiums for which insurance were regularly paid by the acting trustee, out of the assets of the partnership of *Swansborough* and *Oake*. *Swansborough* having requested the trustee to remove the flax from his premises at Grimsby, it was accordingly removed to London by him, partly before, and partly after, the issuing of the fiat against *Harris*, and was there sold. The proceeds of that part which was removed before the date of such fiat amounted to 458*l.* 0*s.* 4*d.*, which was paid to the trustee, who afterwards accounted for that sum to the official assignee under the fiat against *Swansborough* and *Oake*; and the proceeds of the remainder of the flax, amounting to 858*l.* 1*s.* 10*d.*,

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were also paid to such official assignee. That portion of the New Zealand flax, which was in warehouse at Barnsley, was also sent to London to be sold, and produced the sum of 868*l.* 16*s.* 3*d.*, which was likewise paid to such official assignee.

On the 17th October 1839, a fiat issued against *Swansborough* and *Oake*.

Between the issuing of these two fiats, *Swansborough* had paid a great part of the debts of the partnership of *Swansborough* and *Harris*.

On the 18th March 1840, an Order was made for keeping distinct accounts of the joint estate of the several firms of *Swansborough* and *Oake*, and *Swansborough* and *Harris*, and also of the separate estates of *Swansborough* and *Oake*; whereby it was ordered that the joint estate of *Swansborough* and *Harris* should be divided amongst the joint creditors of the two firms who had already proved their debts under either of the fiats, or who might come in and prove their joint debts under the fiat against *Swansborough* and *Oake*; that the proofs of the joint creditors under the fiat against *Harris* should be transferred to the proceedings under the fiat against *Swansborough* and *Oake*; that the official assignee under the fiat against *Harris* should pay over to the official assignee under the joint fiat against *Swansborough* and *Oake* all the joint effects of *Swansborough* and *Harris* then undisposed of; and that the assignees under the separate fiat against *Harris* should be at liberty to act under the joint fiat, as inspectors of the the separate estate of *Harris*, for the purpose of protecting the interests of his separate creditors.

At the audit meeting under the fiat against *Swansborough* and *Oake*, the assignees of *Harris's* estate

claimed the proceeds arising from the sale of the New Zealand flax which had been left at Grimsby, as forming part of the assets of the partnership of *Swansborough* and *Harris*. After a long discussion before the Commissioner, he made an Order declaring that all the New Zealand flax which was left at Grimsby, and which was upon the premises at the time of the commencement of the partnership between *Swansborough* and *Harris*, formed part of the assets of the partnership of *Swansborough* and *Harris*; and he directed the same to be administered accordingly.

The prayer was, that the decision of the Commissioner might be reversed, and that it might be declared that the New Zealand flax never formed part of the assets of the partnership of *Swansborough* and *Harris*, but that the same was the joint property of *Swansborough* and *Oake*.

Mr. *Swanston*, and Mr. *Dickenson*, in support of the petition. The claim of *Swansborough* and *Harris* to the flax in question rested first on the ground of reputed ownership; but the Commissioner, it appears, founded his judgment upon the fact, that they were the true owners. Some of the flax, which was left in the possession of *Swansborough*, on the dissolution of the partnership between him and *Oake*, was sold by him to indemnify himself against certain payments he had made on account of the firm of *Swansborough* and *Oake*; but none of these transactions were entered in any account books until after his bankruptcy, which was another circumstance on which the claim of the estate of *Swansborough* and *Harris* was founded. But the flax was always insured in the joint names of *Swansborough* and *Oake*, as appeared by two policies of insurance produced in

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evidence before the Commissioner; and the premiums for this insurance were regularly paid by the acting trustee out of the assets of *Swansborough* and *Oake*. It appears, that the messenger under the fiat against *Harris* took an inventory of the stock on the premises at Grimsby, among which he included the New Zealand flax, as part of the property of *Swansborough* and *Harris*; and this inventory was sent up by him to London to the official assignee. This document was also set up by the assignees, as further evidence in support of the claim of the estate of *Swansborough* and *Harris*.

Mr. *Anderdon*, and Mr. *Bacon*, contra. On the dissolution of the partnership of *Swansborough* and *Oake*, no alteration whatever was made in the books of account kept by *Swansborough*. With respect to the point of reputed ownership, there were two removals of the flax from the premises at Grimsby, where the business of the partnership of *Swansborough* and *Harris* was carried on,—part being removed on the very confines of the bankruptcy of *Harris*, and the other part being removed by *Swansborough* during the possession of the messenger under the fiat against *Harris*. The mere circumstance of *Swansborough* being the joint owner of the flax does not affect the question of the flax being in the reputed ownership of *Swansborough* and *Harris*. Notwithstanding the agreement that took place in the year 1836 between *Swansborough* and *Oake* and their trustees, there was no delivery of the flax to the trustees, and therefore they could acquire no property in it. When *Harris* was taken into partnership in January 1836, he was walked over the premises by *Swansborough*, and saw in the warehouse a quantity of New Zealand flax.

Before this event *Swansborough* had carried on the business by himself, and *Harris* had therefore good reason for believing that it was part of his stock in trade. It appears, also, that on one or two occasions a portion of this flax was used as part of the joint stock of *Swansborough* and *Harris*, no less than 17,000 pounds weight of it having been wrought up and sold, and the proceeds carried into the books of *Swansborough* and *Harris*.

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Mr. *Swanston*, in reply. In regard to the transaction which has just been alluded to, *Swansborough* paid himself what he had advanced on account of the partnership of *Swansborough* and *Oake*, by sending a part of the New Zealand flax to be worked up elsewhere,—not at the manufactory at Grimsby—and the proceeds were carried into the business, as the separate property of *Swansborough*.

Sir JOHN CROSS. There are several questions arising out of this somewhat complicated case. There is no doubt that the New Zealand flax was originally the property of the two first partners, *Swansborough* and *Oake*, and was intended to be assigned by them to the trustees under the agreement of 1836. But it is contended that the trustees so dealt with this property, as to leave it in the order and disposition of *Swansborough*, and that *Swansborough* did accordingly deal with it as his own property. In order to satisfy myself on these several points, I will look through the affidavits, and consider of my judgment.

Sir JOHN CROSS. This is a case involving a disputed right of property to some New Zealand flax, which is

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claimed by the assignees of *Swansborough* and *Oake*, and also by the assignees of *Swansborough* and *Harris*. It appears that it was originally the property of *Swansborough* and *Oake*, and that in 1836 they agreed to assign all their effects to trustees for the benefit of their creditors, in the same manner as if it had been administered under a fiat in bankruptcy; and that a balance sheet was then produced by them, in which the New Zealand flax, of the estimated value of nearly 6000*l.*, was entered in three different places. This flax was the raw material, which had been provided by them at Grimsby in the course of the business carried on by them for the manufacture of this commodity. There was no formal deed of trust or assignment drawn up on that occasion, but the trustees accepted the trust, and the creditors the terms proposed. *Swansborough*, it seems, made an arrangement with one of his largest creditors, by which the latter agreed to lend him the dividends on his debt, in order that *Swansborough* might pay to the trustees the sum of 1500*l.*, for the value of the buildings and machinery, which the trustees had agreed to sell to him at that price, for the purpose of his continuing the business. Without any definitive arrangement, *Swansborough* continued on the premises, with the permission of the acting trustee. *Swansborough* then began to prosecute an entirely new branch of trade. Instead of manufacturing New Zealand flax, which he had been accustomed to do, he obtained all the machinery for the purpose of manufacturing Baltic flax; and thenceforth continued to manufacture the latter species of flax, with some few exceptions, which are not worth adverting to; but the whole stock of New Zealand flax was inapplicable to the new branch of trade. *Swans-*

borough, in fact, said that it was in his way, and wanted to get rid of it. There can be no doubt but that this flax was the property of the first firm; but the respondents contend that it was transferred by the terms of the new partnership to the new firm. But what right had *Swansborough* to do so. The terms of the new partnership were drawn up by a solicitor, who appears to have had the confidence of both parties. Upon the representation of *Swansborough* that he had brought in stock, for his share of capital, to the amount of 4000*l.*, *Harris*, without any examination of the account or the stock in trade, entered into the partnership. *Swansborough* says, that his capital was the value of the machinery and the stock for the purpose of *the new* branch of trade, and without any reference to the old branch of trade. It appears to me, therefore, that *Swansborough* did not intend to bring in the New Zealand flax to form part of the capital of the new partnership. There is nothing to show that *Harris* knew of its existence; and it is clear to me, that *Swansborough* never did or could bring it in, as part of the capital of the new firm.

Something has been said about the application of the 72d section of the Bankrupt Act to the New Zealand flax, as being in the order and disposition of *Swansborough* and *Harris*; but *Swansborough* himself had the exclusive possession of the property, and *Harris* had no right whatever to interfere in any way in the disposal of it. But, even if it was in the possession of *Swansborough* and *Harris*, I think that no principle of equity can alter the case. If the New Zealand flax was the property of the trustees of *Swansborough* and *Oake*, at the time of the formation of the new partnership of *Swansborough* and *Harris*, no arrangement between those two persons

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could alter the property, and cause it to form part of the assets of the new partnership. There is no authority for saying, that where two persons are the joint owners of property, and one of them becomes bankrupt, the claim of reputed ownership in such a case applies to joint property in the possession of the other partner. I am of opinion, therefore, that the assignees of *Swansborough* and *Oake* are entitled to the

ORDER as prayed—Costs out of the fund.

Ex parte BURDEKIN.—In the matter of JOSEPH
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A. and B., who are partners, trading under the style of C. & Co., sign a guarantee by their private names only, in the following form: "The undersigned hereby guarantee, &c." Semble, the proof in bankruptcy upon this guarantee must be made against the joint estate, if there were any.

But the partnership having been dissolved after the signature of the guarantee, by an

agreement under which *B.* was to be the sole owner of the stock, debts, and effects of the firm, he taking on himself its liabilities: *held*, that a mere general statement, that at the time of the dissolution there were outstanding credits amounting to 200*l.*, and that credits to the amount of 10*l.* were recoverable, without particularizing them, was not sufficient ground for preventing the creditors under the guarantee from receiving dividends out of *B.*'s separate estate.

THIS was the petition of the Bank of Manchester, by its public officer, for payment of the dividend in respect of a proof which they had made against the bankrupt's estate.

It appeared that in December 1837 there were two firms trading at Manchester, under the names and styles of *Banks & Co.* and *Clark & Co.* The former of these firms consisted of *William Banks*, *John Richmond Hayward*, (a brother of the bankrupt,) and *William Cosier Fletcher*; the latter consisted of the bankrupt and another brother, named *James Hayward*. *Banks & Co.* kept a banking account with the Bank of Manchester, which was in 1837 considerably in advance to them, and refused any further accommodation except

upon security. The guarantee of the bankrupt and his brother *James Hayward* was thereupon offered to the bank and accepted by them. It was in the following terms:—

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“ Manchester, 8th December 1837.

“ To the Company of Proprietors of the Bank of Manchester. In consideration of your having, at our request, agreed to make advances or give credit to Messrs. *Banks, Hayward, and Fletcher*, the undersigned do hereby guarantee to you the due payment of all bills of exchange and promissory notes, made, drawn, accepted, advised of, indorsed, advanced, or paid by or on account of the said Bank of Manchester, for the accommodation of the before-named parties, and also all money for the time being owing to, or accruing, or growing due on account of the said Bank of Manchester, from or chargeable to the before-named parties, or of any transaction, dealing, or accommodation which shall make them debtors to the said bank, including interest, commission, exchange, and other usual charges, but only to the extent of 6000*l.*; to which amount this guarantee shall be a continuing security for all the money which may be owing to the said bank from the before-named parties, or any or either of them; and that if more than the sum aforesaid shall be owing, then the said bank may recover against the undersigned to the full extent of this guarantee, and that notwithstanding any action, suit, attachment, proof or claim by the said bank upon or against the estate of the before-named parties, or any or either of them, if bankrupt or insolvent, or any other bankrupt or insolvent estate, and notwithstanding the said bank may have taken, or may hold any other guarantee, bill, note, or security for the payment of the money hereby secured, and without any right, on the part of the under-

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signed, to stand in the place of the said bank in respect of or to claim the benefit of any such proof or other security, or the dividends or proceeds thence arising, until the said bank should have received the full amount owing on the ultimate balance of their account; and that the said bank may recover against the undersigned as aforesaid, notwithstanding any bills or notes forming part of the account may be then in circulation, and notwithstanding any time given, indulgence or forbearance shown, or composition made by the said bank to or with the parties aforesaid, or any or either of them, or their or his executors, or any other parties liable on any bill, note, or other security held by the said bank; and that this guarantee shall be and operate as a continuing security to the proprietors as a fluctuating body, constituting for the time being the said bank, for all advances by the said bank to the before-named parties, separately and jointly, or to them or to either of them jointly with any other or others, whether their or his partner or partners, or not, and under whatever name or firm.

(Signed) "JAMES HAYWARD,
"JOSEPH HAYWARD."

In June 1838, the partnership between *James Hayward* and the bankrupt was dissolved by an agreement, according to the terms of which *Joseph Hayward* was to be the sole owner of, and to have as his sole and absolute property, all the stock, debts, and effects of the firm, taking upon himself the payment of all the debts due from the partnership, and indemnifying *James Hayward* therefrom; and this agreement had ever since been acted upon.

In March 1841, the firm of *Banks & Co.*, which then consisted of *J. R. Hayward* and *W. C. Fletcher*

only, became bankrupt, and the Bank of Manchester proved against the joint estate for 20,123*l*.

On the 13th of April 1841, the present fiat issued against *Joseph Hayward*, who had up to that time carried on the business alone.

James Hayward, after dissolving his partnership with the bank, entered into partnership with one *R. H. Moore*; and on May 18, 1841, a fiat issued against this firm. *James Hayward* had, however, previously paid to the Bank of Manchester 100*l*. in respect of his liability on the guarantee.

On the 10th of May, the Bank of Manchester proved against the separate estate of *Joseph Hayward* for 6000*l*. upon the guarantee; but, upon the assignees afterwards objecting that the 100*l*. paid by *James Hayward* ought to have been deducted, and the proof made against the joint estate of *Joseph* and *James Hayward*, the Commissioners decided that the guarantee was agreed to be given by *James Hayward* and *Joseph Hayward*, as for the firm of *Clarke & Co.*, and that evidence having been given before the Commissioners that there were joint assets, however small, the proof of the Bank of Manchester must be reduced by 100*l*.; and that the bank was not entitled to a dividend, until all the separate creditors of *Joseph Hayward* had been paid in full. And the Commissioners stated, that the case which they thought had settled this point was *Ex parte Leaf* (a), in the first volume of Mr. *Deacon's Reports*.

From this decision the present petition was an appeal.

It appeared that the joint assets referred to by the Commissioners were certain book debts, which *Joseph Hayward* had been unable to get in. And evidence was

(a) 1 Deac. 176.

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gone into as to the character in which it was understood that *James* and *Joseph Hayward* gave the guarantee; but it was conflicting,—the understanding being stated on one side to have been, that the liability of the firm of *Clarke & Co.* was pledged,—and on the other, that the brothers signed the guarantee in their individual capacities.

Mr. *Bacon*, and Mr. *Hull*, in support of the petition. First, as to the construction of the instrument. There are no words importing joint liability, or pledging the firm. The contracting parties are, “the undersigned;” and the signature is by their private names of *James Hayward* and *Joseph Hayward*, and not by their partnership designation of *Clarke & Co.* These express terms would be sufficient to exclude the inference of an intention to create a partnership liability, if the transaction were an ordinary partnership dealing. But a guarantee does not fall within that description; and, in order to bind a firm, must be expressly entered into by them in their capacity of partners. [Sir *John Cross*. It is, however, a joint transaction; and, if a joint contract, it must constitute a joint debt.] Secondly, admitting this to be the case, the proof was properly received against the separate estate; for there are no joint assets. The outstanding debts, which the Commissioners regard as joint assets, were assigned to *Joseph Hayward* on the dissolution of the partnership, and cannot be therefore considered partnership property.

Mr. *Kenyon Parker*, and Mr. *Rogers*, for the assignees. The evidence of the alleged assignment of the outstanding debts, supposing it satisfactory, does not go far enough; for it does not prove that any notice of the

assignment was given to the debtors. Besides, until the partnership liabilities were discharged, according to the agreement, the credits would remain partnership property, for the purpose of being applied in satisfaction of the partnership debts. [Sir *John Cross*. The only evidence produced of the existence of these credits is a general statement, that, at the dissolution of the partnership, there *were* outstanding debts due to the firm to the amount of 200*l.*, and that debts to the amount of 10*l.* can be recovered; but without stating any particulars.] That amount, however, is sufficient to exclude proof against the separate estate; *Ex parte Peake (a)*.

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Mr. *Bacon*, in reply.

Sir JOHN CROSS. The question is, whether it is shown to the satisfaction of the Court, that there is any joint estate. The only attempt at proof of this is a statement, that, at the dissolution of the partnership between *James Hayward* and the bankrupt, which was three years before the bankruptcy, there were outstanding debts owing to the firm, and that debts to the amount of 10*l.* are good, without specifying from whom. I think that is evidence of too loose a description for the Court to act upon. On the other hand, there is evidence before the Court of there being no joint estate, and the evidence is this: that although there were outstanding debts which formed joint estate, yet, that on the dissolution of the partnership, it was agreed between the partners, that *Joseph Hayward* should take all the debts owing to the concern, and all the stock in trade, and

(a) 2 Ro. 54.

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should pay all the debts due from the firm; and this he has done to a considerable extent.

It is, however, contended by the assignees, that an outgoing partner has an equitable lien on all the estate and effects which he leaves behind him, to have them applied in payment of the outstanding debts owing from the concern. I know of no such principle. It has been contended for on some occasions; but Lord *Eldon* has said (a), speaking of the effect of a transfer from a retiring partner to those who continue, in placing the effects in the order and disposition of the latter, "It would be very easy to avoid this, upon the retirement of a partner, by assigning all the effects upon trust to pay the debts." In that way Lord *Eldon* thought the object would be accomplished. It is now, however, contended, that such an expedient is unnecessary, as there is a general rule of equity which will operate in the same way. I think there is no such rule of equity; and that, there not being shown to be any joint estate, the petitioner is entitled to the benefit of the proof which he has made against the separate estate of the bankrupt. The expression in *Ex parte Leaf* referred to by the Commissioners, is only the passing opinion of one of the judges, and not the judgment of the Court.

ORDER as prayed.—Costs out of estate.

(a) *Ex parte Fell*, 10 Ves. 347.

Ex parte JOHN HEATHCOATE and another.—In the matter of WILLIAM WEBB OGBOURNE.

THE petitioners carried on business in partnership, under the style and firm of *Heathcoate & Co.* The petitioner, *John Heathcoate*, claimed to be legal mortgagee of a reversionary interest, and of certain policies of assurance, belonging to the bankrupt; he also claimed to be equitable mortgagee of leasehold premises of the bankrupt, by deposit of title deeds. The firm of *Heathcoate & Co.* claimed also to be equitable mortgagees of the leasehold premises. And this was the usual petition to realize the securities, and apply the proceeds in discharge of the incumbrances of the petitioner, *John Heathcoate*, and of the firm.

The policies were, together with the reversionary interest of the bankrupt under a will, assigned to the petitioner, *John Heathcoate*, by way of mortgage, to secure 1000*l.*, by an indenture dated the 16th of May 1838. One of them was a policy for 500*l.* in the Crown Life Assurance Office, and the other a policy for 500*l.* in the Metropolitan Life Assurance Office, and both upon the life of the bankrupt. By the rules of both offices, the persons effecting insurances were entitled to participate in the profits. Upon the execution of the deed, the petitioner, *John Heathcoate*, gave notice of it to the trustees of the will, under which the reversionary interest was derived, but not to either of the insurance offices.

The next transaction took place on the 29th of June 1841, when the bankrupt borrowed of the petitioner, *John Heathcoate*, 600*l.* upon the security of a deposit of the lease of certain premises in Honey Lane, which

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Reputed ownership of policies of assurance is a matter of fact to be proved, and not to be conclusively inferred from the want of notice to the office, of an assignment or incumbrance.

Tenant's fixtures are not within the 72d section of 6 *Geo.* 4. c. 16.

An equitable mortgage may be created on deeds in the hands of a third party, and by a memorandum of agreement on the part of the mortgagor to assign his interest in the property comprised in the deeds, and that such assignment, when made, and the agreement, in the meantime, should be a security for the amount due on an account current.

The circumstance that a security has been obtained for an antecedent debt, three weeks only before the issuing of the fiat, is not, of itself, sufficient to prevent the creditor from obtaining the usual Order, at once, without a preliminary inquiry.



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had been assigned to the bankrupt absolutely, and upon an agreement to deposit the lease of certain premises in Wood Street, which had been demised to the bankrupt by the lessee by way of mortgage, to secure 80*2*l. 4*s*. The latter of these leases, however, was never deposited, being, together with the mortgage of it to the bankrupt, in the possession of the bankrupt's solicitor, who had a lien upon those instruments for his costs. The memorandum which was taken by the petitioner from the bankrupt on this second transaction, was as follows :—

“ London, 29th June 1841.

“ *John Heathcoate, Esq.*, in consideration of your lending me 600*l.*, in addition to the 1000*l.* you have already lent me, I agree to deposit in your hands, in addition to such securities as you now hold, the lease of the premises lately in possession of *Mrs. Opie Staite*, No. 10, Wood Street, Cheapside, and also the lease of the premises now at present occupied by myself as warehouses, No. 3, Honey Lane, Cheapside. And I hereby give you full and entire liberty to hold the same, and all advantages derivable therefrom, either in the sale of the said leases, or in advanced rents obtainable upon them. And furthermore, I hereby agree to assign and legally make over to you the said securities until the aforesaid 1600*l.*, that is, 1000*l.* and 600*l.*, be duly paid by me, with all interest charges thereon.

“ I remain, Sir, your obedient Servant,

“ W. W. OGBOURNE.

“ *J. Heathcoate, Esq. 8 King Street, Cheapside.*”

The last transaction was with the firm, and took place on the 4th of September 1841, the bankrupt being then indebted to the firm in 600*l.*, on an account current ; it

consisted of a memorandum dated on that day, and signed by the bankrupt, whereby he agreed to execute a valid assignment of all his interest in the premises in Wood Street, and also an assignment of all his interest in the premises in Honey Lane to the petitioner *John Heathcoate*, upon trust for securing the repayment of the sum of 600*l.*, and all other sums due or thereafter to become due from him, either to the petitioner *John Heathcoate*, or to the firm of *Heathcoate & Co.*, with interest at 5*l.* per cent., and costs; and that such assignment when made, and the agreement in the mean time, should be considered as a running or continuing security for all monies so due, or to become due, not exceeding 1500*l.*; with a proviso, that the said agreement should in no degree prejudice or affect any other security held by the petitioner *John Heathcoate*, or the firm of *Heathcoate & Co.*, for all or any part of the said debt, or for any other.

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The fiat issued on the 27th of September, and the premises in Honey Lane had been sold by arrangement between the petitioners and the assignees, the fixtures having been valued separately at 136*l.* 4*s.* 1*d.*, and the purchase money was to abide the opinion of the Court.

Mr. *Bacon*, and Mr. *Heathfield*, in support of the petition. The questions in dispute between the parties are *first*: Whether the policies passed to the assignees under 6 *Geo.* 4. c. 16. s. 72., on account of the want of a formal notice to the office; or whether the authorities of *Duncan v. Chamberlain* (a), and *Ex parte Rose* (b), are not binding on the Court, and conclusive in favour of the petitioners' claim; *secondly*: Whether the tenant's fixtures upon the leasehold premises in Honey Lane are

(a) 11 Sim. 123.

(b) *Ante*, p. 131.

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not subject to the lien created by the deposit of the lease, according to *Ex parte Broadwood* (a).

Mr. *Randall*, for the assignees. These are not all the questions; another is, how far any lien was created upon the lease which was not deposited, but remained with the bankrupt's solicitor. A fourth presents itself with respect to the last transaction, in which no deposit whatever was made, the memorandum only purporting to be an agreement to execute an assignment at a future time. It is by no means clear, that this is sufficient to create an equitable mortgage in the mean time; and if it were, the circumstance of the memorandum having been signed scarcely more than three weeks before the fiat issued, would be sufficient to prevent the petitioners from obtaining an order without a previous enquiry; *Ex parte Wake* (b). [Sir *John Cross*. The shortness of the time before the bankruptcy is only one circumstance leading to suspicion. In the case you refer to, the security was given to a solicitor, which was another circumstance creating distrust.] In *Ex parte Ainsworth* (c), the Chief Judge relied upon the fact of the security being given not for a fresh advance, but for an antecedent debt; a fact which exists here also.

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The two questions adverted to on the other side are still unsettled, no decision of the Lord Chancellor having yet determined those points, on which there is so much conflict among the authorities. With respect to the necessity of proving the existence of reputation of ownership, as an independent fact in every case, instead of inferring it conclusively from the want of notice of an

(a) 1 Mont. Deac. & De G. 631.

(c) 2 Deac. 563.

(b) 2 Deac. 352.

incumbrance, it is remarkable, that the language of the 72nd section of 6 Geo. 4. c. 16. materially differs from that of the statute of *James*; the words made use of in the latter statute being conjunctive, whereas in the former statute they are disjunctive; the term "or" being employed in the room of "and;" so that there would not appear to be any necessity to prove that the bankrupt was reputed owner of the property in dispute, if the other alternative can be established, viz. that he "*had taken upon him the sale, alteration, or disposition thereof as owner.*" And with reference to policies of insurance, it has been decided in a series of cases, that an assignment, without notice to the office, does not prevent the operation of the clause of reputed ownership; *Ex parte Colville (a)*. As to the point that the bankrupt is a partner, and that the notice is dispensed with,—it is questionable whether any partnership exists; if it does, it is a partnership arising from a participation in the profits; but the participation in the profits, out of which the alleged partnership arises, will not take place until after the expiration of certain periods. [Sir *John Cross*. It is analogous to the case of a partnership of *A.* and *B.*, where one of the parties does not receive his share of the profits for two or three years; besides, if there are mutual losses, they are partners; here they mutually assure each other, and incur a liability of loss.] In an ordinary partnership, notice to one partner is presumed in law to be notice to another, founded on the mutual confidence which may be supposed to exist between them; but, in the case of an assurance company, the partnership is created by a mere participation in the profits, and the partners are not cognizant of each other's acts; they may live in different parts

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(a) Mont. 110; Mont. & Bli. 67, S. C. on appeal.

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of the globe, and are perpetually changing in number and identity. And he cited *Ex parte Burton* (a), *Williams v. Thorpe* (b), *Edwards v. Scott* (c), *Gibson v. Orebury*, (d), *Dearle v. Hall* (e), *Ex parte Waithman* (f), *Ex parte Carbis* (g), *Ex parte Masterman* (h).

Mr. Bacon, in reply.

Sir JOHN CROSS. The main question in this petition is, whether the bankrupt was reputed owner of the policies in dispute, at the time he became bankrupt. It is not necessary to say much upon the present occasion; my opinion has been repeatedly expressed upon this point, and I must consider it to be acquiesced in, until overruled by a Court of Appeal. In this case, the bankrupt borrowed money and made a deposit of the policies in question; it is absurd to treat the transaction as a mere deposit of paper, as it was clearly the bankrupt's intention to convey all his beneficial interest in the policies to the petitioner; the title of the petitioner, as against the bankrupt, is complete, and is valid as against his assignees, who can have no higher right than the bankrupt, unless they can establish a title through the medium of the 72nd section. It is by virtue of that clause alone, that the assignees can have any claim to this property; but then it is incumbent upon them to make out a clear title, according to the act of parliament. They must show, that the bankrupt was reputed owner, with the consent of the true owner, and that he was

(a) 1 G. & J. 207.

(b) 2 Sim. 257.

(c) 2 Scott, N. R. 266.

(d) 7 Mee. & Wels. 555.


(e) 3 Russ. 1.

(f) 2 M. & A. 364; 4 D. & C. 412.

(g) 1 M. & A. 693, (note); 4 D. & C. 354.

(h) 2 M. & A. 209; 4 D. & C. 751.

reputed owner at the time of the bankruptcy; for, if the property is reclaimed even a day before the bankruptcy, it is sufficient to take it out of the operation of the 72nd section. Many of the cases cited have turned entirely upon the effect of notice; and in others it would appear, that the judge had put the fact of the reputed ownership out of the question; but no judge is entitled to do that, as it is an essential ingredient, according to the terms of the act of parliament. Reputed ownership is a question of fact; and, in the present case, unless the omission to give notice has had the effect of creating a reputation of ownership, (and I am of opinion that it has not), I think, in the absence of any evidence establishing that the bankrupt was reputed owner of the policies, that the petitioners are entitled to the benefit of their lien. This, and the claim to the fixtures, are the substantial questions on this petition. Fixtures have been repeatedly determined by this Court not to be within the 72nd section. A third question has been raised upon the effect of the agreement to secure the joint debt; and it has been suggested, that it was entered into so near the date of the fiat, as to raise the inference of its being a fraudulent preference. I see no reason for arriving at such a conclusion; and as the security held for large advances was extended merely to a trifling amount, I think the petitioners are entitled to the prayer of their petition.



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July 22 and 23.*

A trader makes a promissory note, as a surety for a debt due to one of the creditors of a firm. The firm and the trader become bankrupt, and the creditor proves against the estate of the trader on the note, and against the separate estate of a partner in the firm on the debt. A dividend is declared and paid on the former proof, but not on the latter. *Held*, that the assignees of the trader were not entitled to an Order to prove against the joint estate of the firm, for the amount of the dividend which they had paid on the promissory note.

Ex parte WILLIAM BROWN, HENRY SIMPSON, and WILLIAM BARKER.—In the matter of ROBERT CAMPION, and JOHN CAMPION.

IN this case, the sureties for the payment of a debt had, as well as the principal debtors, become bankrupt; and the debt had been proved against the separate estates of the sureties, on behalf of which, this petition was presented for leave to prove against the estate of the principal debtors, for the amount of the dividends which had been paid upon the proofs made against the separate estates of the sureties.

The following were the circumstances of the case. The bankrupts, *Robert Campion* and *John Campion*, were brothers, carrying on business in partnership, at Whitby, as bankers. *John Campion*, in partnership with another brother, *William Campion*, carried on in the same town the business of ship builders. The bankers being called upon to give security to Messrs. *Williams, Deacon & Co.* their London agents, for the sums due and to become due from the Whitby bankers to the London agents, remitted for that purpose a promissory note of *Robert Campion* for 10,000*l.*, a bill of exchange accepted by *John* and *William Campion* for 7000*l.*, a promissory note of *William Campion* for 5000*l.*, and another of *John Campion* for the same amount, all dated the 24th of April 1841, and made for the purpose of the security.

On the 19th of May 1841, a fiat issued against the ship builders, *John* and *William Campion*, under which the petitioners were appointed assignees. There was then due from the bankers, *Robert* and *John Campion*, to Messrs. *Williams, Deacon & Co.* 5458*l.* The fiat

against the bankers, *Robert and John Campion*, issued on the 22nd of May 1841. On the 17th of May 1842, Messrs. *Williams, Deacon & Co.* proved against each of the separate estates of *John Campion* and *William Campion* for 5000*l.* on the promissory notes. They also proved against the joint estate of *John and William Campion* for 458*l.*, on the joint promissory note of the firm.

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At the time of the bankruptcy of the ship building firm, they were indebted to the Whitby bankers in 9433*l.* 19*s.* 1*d.*, having overdrawn their account with the bank to that amount; and an Order had been obtained for leave to prove for that amount, on behalf of the joint estate of the Whitby bankers against the joint estate of the ship builders; but the dividends upon this proof were to abide the opinion of the Court on this petition. A dividend of 2*s.* 4*d.* in the pound had been declared on the separate estate of *John Campion*, and of 3*s.* in the pound on the separate estate of *William Campion*. On the joint estate of the two, the dividend was 1*s.* 6*d.* in the pound. So that the dividends paid to Messrs. *Williams, Deacon & Co.* on their proofs were 583*l.* 6*s.* 8*d.* from the separate estate of *John Campion*, 750*l.* from the separate estate of *William Campion*, and 37*l.* 4*s.* from the joint estate of the two.

Messrs. *Williams, Deacon & Co.* had also proved against the separate estate of *Robert Campion* for their whole debt upon the promissory note for 10,000*l.*, but no dividend had yet been declared of their estate.

The prayer was, that the proof which, by the Order of the Court, had been admitted on behalf of the estate of *Robert and John Campion*, against the joint estate of *John and William Campion* for 9433*l.* 19*s.*, might be

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reduced by 458*l.*, the amount which Messrs. *Williams, Deacon & Co.* had proved against that estate; or otherwise, that the petitioners, as representing the joint estate of *John and William Campion*, might be at liberty to go in under the fiat issued against *Robert and John Campion*, and prove against their estate for the last mentioned sum. And that the petitioners, as representing the separate estates of *John Campion* and *William Campion*, might be at liberty to prove against the joint estate of *Robert and John Campion* for the amount of the dividends which had been, or should thereafter be, paid out of such separate estates respectively, to Messrs. *Williams, Deacon & Co.*, upon the promissory notes given to them by *John Campion* and *William Campion* respectively, and might be at liberty to prove immediately for the dividends then payable to Messrs. *Williams, Deacon & Co.* out of such separate estates, amounting to 583*l.* 6*s.* and 750*l.*, or as regards the latter of these dividends, for the sum of 256*l.* 1*l.* 8*d.*, being the balance, after deducting from the sum of 750*l.*, a debt of 493*l.* 8*s.* 4*d.*, which was due from the separate estate of *William Campion* to the Whitby Bank. And, that the petitioners might be at liberty thereafter to prove from time to time against the estate of *Robert and John Campion*, on behalf of the separate estates of *John Campion* and *William Campion* respectively, for the amount of the dividends that might be thereafter paid out of such estates respectively, to Messrs. *Williams, Deacon & Co.* in respect of the promissory notes, as and when such dividends should from time to time be paid.

Mr. *Anderdon*, in support of the petition, at first contended for the reduction of the proof which had been

made on behalf of the Whitby Bank against the joint estate of the ship builders; but, upon the Court intimating an opinion against him on that point, he maintained that proof might be made against the joint estate of the Whitby bankers for the amount which had been paid by way of dividends out of the separate estates of the ship builders; or, at all events, for the amount which had been paid out of the estate of *William Campion*.

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Sir JOHN CROSS. Can you produce any instance, in which assignees, who have paid a dividend, have been allowed to prove in respect of that payment?

Mr. *Anderdon*. Suppose no fiat had issued against the ship builders, and they had paid the same amount in satisfaction of the whole debt, they would then have had a right of proof against the estate of the principal debtors; and their bankruptcy cannot make any difference in this respect.

Mr. *Bacon*, and Mr. *T. Turner*, for the assignees of the Whitby bankers. The argument on the other side rests on the proposition, that our estate is completely exonerated by the proofs against the separate estates of *John Campion* and *William Campion*; and that is the only foundation on which the argument can rest; for a surety cannot prove against the principal debtor, unless he has paid the whole debt, or part, in discharge of the whole; *Ex parte Rawson*(a). But there is no pretence for saying that our estate is exonerated. A creditor, by proving against a surety, does not prejudice his right to

(a) Jac. 274; and see *Ex parte Coplestone*, Mont. & Ch. 262; 3 Deac. 546; and *Cowley v. Dunlop*, 7 T. R. 565.

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prove against the principal debtor for the whole amount of the debt.

Mr. *Anderdon*, in reply.

Sir JOHN CROSS. The question is one of some nicety.

Cur. adv. vult.

July 30.

Sir JOHN CROSS. In this case, there were at Whitby two partnerships between three brothers; *Robert* and *John Campion* were partners as bankers, and *John* and *William Campion* were partners as ship builders, *John Campion* being therefore a member of both firms. The bankers have proved against the ship builders a debt of about 9433*l.* The London agents of the Whitby bankers have proved a debt of 5000*l.* against the separate estates of each of the ship builders, who had guaranteed the payment of the debt from the Whitby bankers to the London bankers. On these proofs, the separate estates have paid dividends, one of them to the amount of 583*l.* 6*s.*, the other to the amount of 750*l.* The petitioners, as the assignees of the ship builders, under these circumstances, claimed at first to reduce the proof made on behalf of the Whitby bankers by the amount of the sums proved by the London bankers against the estates of the ship builders; this claim, however, they now abandoned, and, I think, very properly, as the sum of 9433*l.* was the joint debt of the two, whereas the sums of 5000*l.* were separate debts. The sums were, therefore, incapable of being set off the one against the other. The petitioners have now reduced their claim to the amount of the dividends paid out of the separate

estate of *William Campion*; and the foundation of all the rights insisted upon by the petitioners is, that these dividends have *pro tanto* exonerated the Whitby Bank. But I do not think that there has been any exoneration at all of the Whitby Bank; and I am not aware of there being any precedent for such a proceeding as that prayed by the present petition.

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BROWN
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Petition dismissed, without costs.

Ex parte ROGERS and others.—In the matter of

MAGNUS.—

Serjeants' Inn,
July 23.

THIS was a petition that the debts of two other creditors might be substituted for one of the petitioning creditor's debts, which was insufficient to support the fiat. It appeared that a certain portion of the petitioning creditor's debt was founded on a sale of goods to the bankrupt on the 13th of January, for which he indorsed and delivered to the petitioning creditor a bill of exchange for the amount. This bill the petitioning creditor had negotiated for value; and it was neither due, nor in his hands, at the time when the act of bankruptcy was committed; not having been returned to him for non-payment, until the 4th March. The bankrupt had presented a petition to annul, on the ground that a debt so constituted was a bad petitioning creditor's debt; when the Court, entertaining some doubt upon the point,

A petitioning creditor's debt was alleged to be insufficient to support the fiat, on the ground that part of it was composed of the amount of a bill of exchange, which had been negotiated by him, and was not in his hands at the time of the act of bankruptcy. It appeared, however, that this bill had been indorsed over by the bankrupt to the petitioning creditor, in payment of the price of a parcel of goods sold and deli-

vered by him to the bankrupt. On a petition to substitute another debt, under the 6 Geo. 4. c. 16, s. 18: *Held*, that it was no objection that the debt proposed to be substituted was incurred anterior to the time when the bill was returned to the petitioning creditor, if it was actually incurred not anterior to the time of the sale and delivery of the goods.

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ordered the petition to stand over, for the purpose of substituting another debt (a).

Mr. *Anderdon*, in support of the petition.

Mr. *Kenyon Parker*, and Mr. *Wright*, *contrà*. In this case, part of the petitioning creditor's debt did not accrue until the 4th of March, when he was obliged to pay the dishonoured bill; and the debts proposed to be substituted were incurred anterior to that day. The creditors to whom those debts are alleged to be due swear, only, that the debts are "not anterior to the bill of exchange, constituting the petitioning creditor's debt." But this allegation is so vague and general, that it amounts to nothing. It may mean that the debts were not anterior to the date of the bill, or the delivery of the bill by the bankrupt to the petitioning creditor. Such a general mode of swearing was animadverted upon by the Court in *Ex parte Ullathorne* (b). But we contend, that, as the petitioning creditor had parted with the bill for value, and it was not in his hands when the fiat issued, there was no debt at all of sufficient amount to constitute a good petitioning creditor's debt. This portion of the debt, therefore, was not merely insufficient, but it had no existence. Consequently, the provision of the statute 6 Geo. 4. c. 16. s. 18. as to the substitution of a debt, where the petitioning creditor's debt is "found insufficient," becomes in this case a perfect nullity, when the debt is fictitious altogether. Here the bill of exchange was not in the hands of the petitioning creditor, and formed no portion of any good petitioning creditor's debt.

(a) See *Ex parte Magnus*, ante, 604.

(b) 1 Mont. Deac. & D. 338.

Sir JOHN CROSS. The petitioners have showed that the debts proposed to be substituted are sufficient in amount, provided they were incurred not anterior to the debt of the petitioning creditor. Now the only ground for opposing this petition is, that a part of the petitioning creditor's debt was contracted on the 4th of March, when the bill of exchange was returned to him for payment. But it is quite clear, that so much of the petitioning creditor's debt, as was insufficient to support the fiat, was incurred originally on the 13th January, when the goods were sold to the bankrupt; and that this transaction was the real foundation of the debt, which was not extinguished, but only suspended, by this outstanding bill of exchange, which has never been paid. And as it is sworn, that the debts proposed to be substituted were incurred since the 13th January, I think the 18th section is applicable to this case, and that the Order may go for the fiat to be proceeded in.

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Ex parte
ROGERS
and others.

Usual ORDER for substitution.

Ex parte BENJAMIN COTTON.—In the matter of JAMES
NUTTER and WILLIAM ELLISTON.

THE question in this case was, as to the right of a mortgagee in fee to trade fixtures, as against the assignees of the mortgagor; the only peculiarity which distinguished the case from the others recently before the Court on the same subject, being, that the fixtures were not set up by the mortgagor alone, but by him and a partner who carried on business with him upon the mortgaged premises.

The following were the facts of the case. The bank-

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July 29.*

A trader mortgages the trade premises in fee, and then enters into partnership, and the firm carry on business on the same premises, and erect trade fixtures: *Held*, on their bankruptcy, that the mortgagee was entitled to the trade fixtures.

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rupt, *James Nutter*, having purchased certain premises of the petitioner for 6000*l.*, was only able to pay 1000*l.* on account of the purchase money. It was therefore agreed between them, that the remaining 5000*l.*, and interest, should be secured by a mortgage of the premises. And, accordingly, by indentures of lease and release, and assignment, dated the 25th and 26th of December 1837, made between the bankrupt, *James Nutter*, of the one part, and the petitioner of the other part, the purchased premises, under the description of the freehold messuage or tenement situate, standing, and being in Trumpington Street, in the parish of St. Mary the Less, in the town of Cambridge, and also the brewing office situate in the yard adjoining, and belonging to the same messuage or dwelling house, and the mill-house, spirit warehouse, malt chambers, stables, chaise-house, counting house, storehouse, and corn chambers adjoining and occupied therewith, together with all and singular the houses, outhouses, edifices, buildings, counting houses, barns, stables, coach houses, granaries, yards, gardens, brewhouses, plant and fixtures, and all other the rights, members and appurtenances whatsoever to the said messuage or tenement, brewhouse, hereditaments and premises thereby granted and released, belonging or in anywise appertaining, or with the same usually held, occupied, or enjoyed, and also a certain leasehold estate adjoining, were respectively conveyed and assigned by the bankrupt, *James Nutter*, to the petitioner, as to the freehold estate, in fee; as to the plant and fixtures, absolutely; and as to the leasehold premises, for all the residue of the term therein; subject to a proviso for redemption on payment of 5000*l.* and interest.

The bankrupt, *James Nutter*, proceeded to carry on

his business of a brewer upon the premises, in partnership with his brother, *Thomas Nutter*, who, in 1840, retired from the firm, and was succeeded by the bankrupt, *William Elliston*. The two bankrupts thenceforward carried on the business until the bankruptcy. Soon after *Elliston* became a partner in the concern, alterations and additions were made in the brewing plant and fixtures; the additions were, however, partly in substitution for portions of the plant and fixtures which were on the premises at the time of the mortgage.

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The fiat issued on the 26th March 1842; and the assignees having advertized for sale the portion of the plant, utensils, vats, and fixtures, which consisted of the alterations and additions made on the mortgaged premises subsequently to the date of the mortgage, this petition prayed, that it might be declared that such alterations and additions formed part of the mortgage security; and that the assignees might be restrained from selling the fixtures and things forming and comprising such alterations and additions, and from removing them from the premises.

Mr. *Bacon*, in support of the petition.

Mr. *Anderdon*, and Mr. *Dixon*, for the assignees. This case differs from all former cases on this subject. All we ask for is the value of the fixtures, which were added at the expense of the firm. The former decisions in favour of mortgagees were, either in cases where the mortgagor, being the freeholder, had added subsequently to the mortgage fixtures,—which the Court has held to be an accretion to the subject of the security,—or in cases where the owner of a valuable lease-



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hold interest has mortgaged that interest, and then erected fixtures which he was entitled to remove, as against the landlord. In this last case there has been considerable difference of opinion, as to whether articles, which are considered moveable as against the landlord, are not to be also considered moveables as against a mortgagee: but, no doubt, the opinion which has prevailed in this Court, as it is at present constituted, has been in favour of the articles being regarded as immovables, and accretions in favour of the mortgagee. The present case, however, is of a different description. If a mortgagee permitted the mortgagor to let the premises, and allowed the tenant to set up fixtures which, as against a landlord, the tenant might remove, none of the cases alluded to would be an authority entitling the mortgagee in such a case to claim those articles, as against the tenant's assignees. Yet that would be, in principle, the same case as the present; for here the partnership became, with the knowledge and assent of the mortgagee, tenant of the premises, and erected at the expense, not of the mortgagee, but of the partnership, trade fixtures. On what principle can it be held that these are accretions? The question is, whether the mortgagee is to take property set up by persons other than the mortgagor. And they referred to *Ex parte Broadwood* (a); and distinguished the present case particularly from *Ex parte Bentley* (b) and *Ex parte Starks* (c).

Mr. Bacon, in reply, was stopped by the Court.

(a) 1 Mont. Deac. & De G. 631.

(b) *Ante*, 591.

(c) 1 Mont. Deac. & De G. 240.

Sir JOHN CROSS. It is admitted, that the mortgagee is entitled to all the fixtures which were upon the premises at the time of the mortgage; and the only question is, with respect to those which have been added subsequently to that period. By the general rule of law, fixtures belong to the premises to which they are affixed, as between mortgagor and mortgagee, without any such distinction as that of tenant's fixtures. A tenant may pledge the fixtures which he is entitled to remove, but so long as they remain fixed to the freehold, they are not goods and chattels, so as to pass by the 72d section. This is the general rule as to all fixtures; there may be exceptions, and it was competent to have shown that the additions in question ought to be excepted from the general law; but they have not done so.

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With respect to the rights of the partners of the mortgagee, the Court has nothing to do with them. They arise out of transactions confined to the partners themselves, and to which the mortgagee is an utter stranger. Therefore, whether the fixtures were added by the mortgagor, or by the partnership, may be a question to be discussed between the partners and those claiming under them, but it is one with which the mortgagee has no concern whatever. He is entitled to all the fixtures which he finds on the mortgaged premises. I am, therefore, of opinion that the mortgagee is entitled to the declaration which he asks for, and that all the fixtures upon the premises at the time of the bankruptcy belong to him. Of course, this will not include any articles which are moveable. What articles are fixtures, and what moveables, is often a troublesome question of fact; and if the parties differ upon it in this case, there must be a reference and an inquiry on the subject.

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ORDERED, as prayed; and that it should be referred to the Commissioners to inquire what articles on the premises were, or were not, fixtures, at the date of the bankruptcy, without regard to whether they were trade fixtures or not; reserving further directions and costs.

Ex parte RICHARD WACE.—In the matter of WILLIAM BIRCH PRICE and JOHN EDWARDS.

Serjeants' Inn,
July 30.

Order for sale of part of the property comprised in a security, without prejudice to the creditors' lien upon the remainder; which was at the time unsaleable, from being the subject of litigation.

THIS was the petition of a creditor, having a security, for a sale of part of the property on which his debt was secured, the remainder being unsaleable, on account of its forming the subject of litigation.

The security was created by the following memorandum, "In consideration of Mr. *Richard Wace* having, at my request, paid my brother *Richard Edwards* 1300*l.*, in part of the purchase money agreed to be paid by me to him for the purchase of a copyhold estate in the Manor of Condovery, and certain rents and monies severally specified in certain agreements entered into between me and him, dated on or about the 16th of April 1833, and 23rd of February 1841, I do hereby charge the said estates, rents, and monies, and all rents and monies due in respect of the said estate, and also the Hampton Hall, and all other my real estate, with the payment to the said *Richard Wace* of the said sum of 1300*l.*, with lawful interest; and I do hereby further agree with the said *Richard Wace*, that I will pay him the said 1300*l.*, and interest, at the end of six months from the date hereof. Dated this 3rd day of March 1841. *John Edwards.*" The Hampton Hall estate was subjected to

a mortgage for 5000*l.*; and with respect to this estate, a bill in chancery had been filed by one *Thomas Price* against the assignees and the petitioner, and various other persons, to have the priorities of their several incumbrances ascertained and declared. The suit was still pending, and was likely to be a considerable time before it was heard. Under these circumstances, the prayer was, that the other estates affected by the petitioner's security might be sold, with the usual directions, without prejudice to the petitioner's right with respect to the estate, which was the subject of the suit in chancery.

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The COURT made the Order, as prayed.

Mr. *Anderdon*, for the petitioner.

Mr. *Bacon*, for the assignees.

Ex parte JOHN BUTLER.—In the matter of THOMAS
BAKEWELL.—

Serjeants' Inn,
July 20 and
August 2.

THIS petition had been set down for further directions, and it also came on by way of exceptions to the registrar's report. It was the petition of an assignee under a second commission, praying, that a subsequent fiat might be annulled, and that the assignee who had been appointed under it might account to the petitioner for all monies and effects of the bankrupt which had come to

An assignee under a second commission, under which the bankrupt obtains his certificate, but does not pay 15*s.* in the pound, lies by, while the bankrupt is subsequently trading to a great ex-

tent for a period of eight years, without making any claim to his subsequently acquired property. The party then becomes bankrupt a third time. *Held*, that the assignee under the third bankruptcy, and not the assignee under the second commission, had, on principles of equity, the preferable claim to the property thus subsequently acquired.

Held, also, that such principle of equity applied as well to real, as to personal property, notwithstanding the clause of order and disposition (6 *Geo.* 4. c. 16. s. 72.) only applies to personal estate.

Where a petition is set down for further directions, and comes on also by way of exceptions to the registrar's report, the petitioner's counsel is entitled to begin.

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his hands, and claiming (under the 6 Geo. 4. c. 16. s. 127.) all the property in the possession of the bankrupt at the time of his third bankruptcy, by reason of his not having paid 15s. in the pound under the second commission. When the petition came on for hearing on the 9th July 1838, the Court made an Order that it should be referred to the registrar to appoint a receiver of the bankrupt's estate, as well under the second commission of bankrupt, which issued on the 19th April 1828, as under the present fiat; and that the registrar should take an account of the effects received by the assignee under the fiat, and inquire whether the estate of the bankrupt under the second commission had produced sufficient to pay the creditors 15s. in the pound; and whether any of the goods or chattels possessed by the assignee under the fiat were, with the consent and permission of the true owner, in the possession, order, and disposition of the bankrupt, as the reputed owner, at the time of his third bankruptcy. And the Court reserved all further directions and costs in the matter, and the parties were to be at liberty to apply to the Court as they should be advised.

Under this Order the registrar made his report, finding, that the assignee under the fiat had received 4989*l.* 13*s.* 4*d.*; that he had paid thereout 3037*l.* 0*s.* 1*d.*; and that he had a balance in his hands of 1942*l.* 13*s.* 3*d.*; that the estate of the bankrupt under the second commission had not produced 15s. in the pound; and that not any of the goods or chattels possessed by the assignee under the fiat were, with the consent and permission of the true owner, in the possession, order, and disposition of the bankrupt, as the reputed owner, at the time

of his third bankruptcy. To this report the respondent had excepted.

It appeared, that the first commission issued on the 4th April 1815, under which the bankrupt obtained his certificate, and a dividend of 6s. 8d. in the pound was declared; but the petitioner alleged, that he did not hear of the first bankruptcy, until the 1st November 1836.

The second commission, as already stated, issued on the 19th April 1828, under which the bankrupt also obtained his certificate, but only paid a dividend of 1s. 7d. in the pound.

After obtaining his certificate under the second commission, the bankrupt went into trade at Manchester, and the petitioner had various dealings with him. He was however again in difficulties; and on the 12th October 1836 he was arrested for debt, and on the 21st December 1836 took the relief of the Insolvent Debtors' Act.

On the 4th November 1836 a meeting of the bankrupt's creditors was held, when it was communicated to several persons, that he had been a bankrupt on two former occasions.

On the 8th November 1836 the subsequent fiat issued, under which the respondent was appointed assignee; and on the 14th December 1836, the petitioner served on the respondent a notice of his claim to the bankrupt's property, as assignee under the second commission.

On the 8th February 1837 the petitioner brought an action of trover in the Court of Common Pleas against the assignee under the fiat, to recover the bankrupt's property which had been possessed by him under the fiat, by reason that the bankrupt had not paid 15s. in the pound under the second commission. On the 19th

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August 1837 the cause came on for trial at the Liverpool assizes, when verdicts were found for the petitioner on all the five issues, for 1160*l.* damages; but the judge gave the defendant leave to move the Court above for verdicts on the second and third issues. On the 29th January 1838, after much discussion, the Court of Common Pleas (*a*) decided that the petitioner was entitled to retain the verdict on the first and fourth issues; but, with respect to the other issues, the Court expressed its opinion that the goods and chattels, which were the subject of the action, were in the order and disposition of the bankrupt, with the consent of the petitioner, the true owner, at the time when the bankrupt was arrested and committed to prison previous to his discharge under the Insolvent Act, and consequently that the assignee of the Insolvent Debtors' Court was entitled to such goods and chattels, and that it was competent to the defendant to set up the title of such assignee; and therefore a verdict was ordered for the defendant on the third issue. As to the second issue, the Court decided that there ought to have been a new trial, as the jury had accidentally omitted to find the act of bankruptcy; but, inasmuch as the Court had come to the above conclusion on the third issue, they considered the not finding of such act of bankruptcy to be immaterial, and therefore directed a verdict to be entered for the defendant on the second issue. And as to the fifth issue, the Court suggested that the jury should be, as it were, discharged from giving any verdict; which was assented to by both parties. The result of the above proceedings was, that nothing whatever was finally decided, with respect to the

(*a*) See the report of the case, *Butler v. Hobson*, 4 Bing. N. C. 290; 5 Id. 131.

rights of the creditors under the second commission, and those under the subsequent fiat.

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Mr. *Chandless*, in support of the exceptions to the registrar's report, contended that he was entitled to pre-audience in the argument; as the Court could not make any further directions in the matter, until the exceptions to the report were disposed of.

Sir JOHN CROSS. As the matter is set down for further directions, I think that the petitioner's counsel is entitled to begin, notwithstanding the report has been excepted to.

Mr. *Bacon*, and Mr. *Bagshawe*, in support of the petition. It will be attempted on the other side to show, that the petitioner was cognizant of the first bankruptcy, and ought not to have lain by so long, before he made the present claim; but it is positively sworn by him, that he never knew any thing of the first commission until the 1st November 1836. When the bankrupt went into business at Manchester after his second bankruptcy, the petitioner concluded that he was a person competent to deal with him, and accordingly had various transactions with him in business; and it was not till the bankrupt called a meeting of his creditors in November 1836, that he then for the first time stated that he was a bankrupt in 1815. When the case was before the Court of Common Pleas (a), the Lord Chief Justice said, that it was not enough to show, that the estate and effects of the bankrupt acquired subsequently to his certificate might have produced sufficient to pay all his creditors under

(a) See *Butler v. Hobson*, 5 Bing. N. C. 128

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the commission 15s. in the pound; but it must be proved, that his estates and effects existing at the date of the certificate had actually produced sufficient to pay 15s. in the pound. As the petitioner had no notice of the issuing of the first commission, the question of order and disposition could not arise in this case; for if he was ignorant of the only right that vested the property in him, it cannot be said that the property remained in the possession of the bankrupt, by the consent and permission of the true owner, within the meaning of the 72nd section of the Bankrupt Act. And as to any alleged acquiescence, a party is not bound by any acquiescence, when he is not cognizant of his rights; *Ex parte Chambers (a)*. [Sir John Cross. If I let another party take my goods, not knowing that they are mine, there is no doubt that when I know the fact, I can reclaim them. But if, in consequence of my ignorance, another party is injured, it becomes then a question, whether I can assert my property in them, to the injury of a third person.] We submit that the rule is clear, as laid down by Lord Cottenham in *Ex parte Chambers*, that no party is bound by acts adopted and taken by him in ignorance of his rights. There can be no consent, where there is no knowledge. The chief judge on the former hearing said, that a man could not be taken to consent to part with his property, if he did not know that it was his own. The question resolves itself into this,—if the law has said, that, under certain circumstances, the property is vested in the assignees under the second commission, can this Court, on the ground of an equity arising, say that the property shall be handed over to the assignees under the third fiat? We contend that there is no authority for such an equity.

(a) 2 Mont. & A. 440; 1 Deac. 197.

Besides, the question of consent cannot apply to parties filling, like assignees, a public trust.

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Sir JOHN CROSS. It is not merely here the dry question of consent, but whether, from your ignorance, as you say, other persons were induced to deal with the bankrupt and give him credit; and whether, that would not be a sufficient answer to the claim set up by this petition. Suppose a party stands by and permits another to sell his goods, and encourages him to do so, can he afterwards recall his goods, to the injury of the *bonâ fide* purchaser? With respect to the alleged plea of the ignorance of the petitioner of the existence of the first commission, he was bound to know his rights, as assignee under the second commission. It is not suggested, that the *creditors* under the second commission did not know of the previous commission.

Mr. *Chandless*, for the assignees under the fiat. The bankrupt was possessed of some freehold property, at the time of the issuing of the fiat, which the bankrupt had bought for 930*l.* Now, independently of the 72nd section, which relates only to personal property, this Court, under the general principles of equity which it is guided by, has always held, that, where creditors lie by and permit a man to obtain credit with the world, they shall not afterwards take advantage of it, to the prejudice of persons who have trusted him. This principle applies to real property, as well as to personal property; and, in accordance with this principle, the case of *Ex parte Jungmichel* (a) was lately decided by this Court, where it was held that the assignee under a third fiat could

(a) *Ante*, 471.

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not be called upon to deliver up the assets collected by him to the assignees under a second fiat, where the latter permitted him to trade for five years, without molestation on the part of themselves, or any of the creditors under the second fiat.

Mr. *Bacon*, in reply. The case just cited does not apply to the facts of this; for there the assignees under the second fiat knew all along of the issuing of the previous fiat; while here the assignee was wholly ignorant of the first commission. With respect to the freehold property,—that is actually vested in the assignees under the second commission by the 127th section of the Bankrupt Act; and the 72nd section has no bearing whatever upon freehold property. This Court cannot deprive a man of his vested right in freehold property. In *Nias v. Adamson* (a), it was held, that the assignees of a bankrupt might reclaim his property, although they had, for a valuable consideration paid them by a third person, agreed to leave it in the bankrupt's possession. [Sir *John Cross*. There the rights of third parties in the property were not injured.] We rely, however, in this case upon the petitioner's perfect ignorance of the first commission, and his consequent unconsciousness of his rights. The Court would not on the former hearing have directed an inquiry, if it was thought, that the question of *consent* did not imply *knowledge*. This man goes with 930*l.* and purchases a real estate. If the assignee under the second commission had known of the previous one, he might have taken the 930*l.*; but he had no knowledge whatever of his rights. If the assignees, with a full knowledge of their right to property in the

(a) 3 B. & Ald. 225.

possession of the bankrupt, were to permit him to trade with it, and to gain a false credit with the persons dealing with him,—that would be a very different case. But there is nothing here approaching to the connivance or consent of the assignee. In *Ex parte Storks* (a), which was a case of conflicting claims between the creditors under a second commission, and the assignees under a previous commission, Lord *Eldon* observed, that, “proceeding upon the laches of the assignee, it is hard to say, that his conduct shall operate against the legal rights of those who are neither implicated in, nor conusant of it.” I only cite this to show, that whatever is done by a trustee in perfect ignorance of his rights, the other parties, who are interested in the subject of the trust are not to be prejudiced by it.

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Mr. *Chandless* stated, that the freehold property in question, which was now claimed by the petitioner, was, in January 1836, actually conveyed by the bankrupt to the petitioner, as a trustee for the bankrupt and his wife and children.

Cur. adv. vult.

Sir JOHN CROSS. In this case, the respondent, who is the assignee under a third fiat against the bankrupt, is called upon to pay over the proceeds of the estate and effects now in his hands to the petitioner, who insists on a prior right, in consequence of the bankrupt having been previously the subject of a second commission, under which the creditors have not received dividends to the amount of 15s. in the pound. In answer to this claim, the respondent's assignee contends, that the peti-

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(a) 2 Rose, 179.

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tioner has permitted the bankrupt to carry on trade for some years, without any interference on the part of the petitioner, and to obtain thus a false credit in the world; and that the petitioner has thereby abandoned that legal right, with which the law had invested him. The petitioner replied, that he did not know, when acting as assignee under the second commission, that there had been any previous commission issued against the bankrupt; and upon that allegation of want of knowledge he rested his whole case. The petitioner had brought an action, with a view to the recovery of these effects, but the suit was attended with no satisfactory result; for justice was obscured, and finally wrecked by a cloud of special pleading. It is only to be regretted, that the defendant did not apply to this Court for an injunction to stay the action, and decide the rights of the respective parties on principles of equity. If the property in question was held by the bankrupt, with the consent of the petitioner, then, under the provisions of the 72nd section of the Bankrupt Act, the whole would pass to the assignee under the third fiat. I do not, however, look alone to the 72nd section for the determination of this question, but to the principles of equity as recognized in the cases of *Troughton v. Gitley* (a), and *Ex parte Brown* (b), the first decided by Lord Camden, and the last by Lord Loughborough. In *Troughton v. Gitley*, an uncertificated bankrupt was permitted by the assignees and creditors to trade for four years, and then died, having contracted various debts during such subsequent trading; and it was there held, that the subsequent creditors were to be preferred in equity to the creditors under the commission. Lord Camden there says, that the

(a) Ambler, 630.

(b) 2 Ves. jun. 67.

first set of creditors "knew that the bankrupt continued to trade, and that the effects were delivered over to him, and that he was trading with a multitude of persons; and in order to do that, it was necessary that he should take, as well as give, credit. This is a declaration to all mankind, that he had sufficient capacity. It falls within the principle, that, if a man having a lien stands by and lets another make a new security, he shall be postponed; the common case of first mortgagee suffering a second mortgage, without giving notice of his security." It is very true, that Lord *Eldon* has said in *Ex parte Martin* (a), and in *Ex parte Storke* (b), that the case of *Troughton v. Gitley* was not of very high authority; but the decision of Lord *Camden* in that case has never been overruled; and in *Ex parte Brown* (c), Lord *Loughborough* explains the principle upon which the decision in that case was founded, saying "the case before Lord *Camden* was upon the *laches* of the first creditors, and the false credit which they gave."

With respect to the present case, it appears that in the year 1815 *Bakewell* became a bankrupt, and, having obtained his certificate in the following year, recommenced trading elsewhere, having removed from Staffordshire to Derbyshire, and thence to Manchester, where he took a lease of certain premises for carrying on his trade. Two years after he obtained his certificate under this first commission, *Bakewell* married the sister of the petitioner. There were afterwards various dealings between them; and on the eve of his second bankruptcy, the petitioner, in 1827, put in an execution for a sum of 740*L.*, upon which, in order to induce the peti-

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(a) 16 Ves. 114.

(c) 2 Ves. jun. 68.

(b) 3 Ves. & B. 106; 2 Rose, 179.

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tioner to withdraw it, the bankrupt conveyed to him his leasehold interest in the business premises. In April 1828 the second commission issued, under which the petitioner proved a debt of 650*l.*, and was chosen assignee, in conjunction with another individual, since deceased; and a year afterwards the bankrupt obtained his certificate. Shortly after this, the petitioner re-assigned the lease to the bankrupt, and received thereon the sum of 266*l.*; which ought by rights to have been distributed among the creditors under the second commission. But the petitioner appears to have considered him a free trader, and the bankrupt in fact carried on business for a period of eight years in the midst of his former creditors; the petitioner, though residing at some distance, being nearly connected with the bankrupt, and continuing to transact business occasionally with him. In the year 1836, before the third fiat issued, on the purchase of an estate by the bankrupt, for the price nearly of 1000*l.*, the petitioner became a trustee for the benefit of his brother-in-law, the bankrupt, and his children; the petitioner's sister, the bankrupt's wife, having died in the month of October in the previous year. On this occasion, when a sum of near 1000*l.* passed from the bankrupt, the petitioner might have claimed the money, as assignee under the second commission; but he did not do so, and abandoned his right to the money altogether. In the years of 1834, 1835, and 1836, the bankrupt's books showed various transactions in business to the amount of 85,000*l.*, 145,000*l.*, and 200,000*l.*; and all the time while these large sums passed through the bankrupt's hands, the petitioner and the other creditors under the second commission were looking on and took no notice of these transactions, although they had only

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received a dividend of 1s. 7d. in the pound under the second commission. In October 1836, just before the fiat issued, the petitioner went to Manchester, and saw the way in which the bankrupt was trading, and yet took no steps to claim any of the property with which he was then dealing. The only excuse that the petitioner has made for his non-interference is, that he did not know of the first commission. But I think, considering his near relationship and connection with the bankrupt, that he must be taken to have known of the first commission. I do not mean to say, that, when the petitioner swears he did not know of it, he swears falsely; but it certainly appears to me, that he had every means of knowledge, and that he ought to have known of it; so that his ignorance of the fact is no sufficient answer to the charge of indifference and neglect. If a man for a period of eight years, after proving his debt under a commission, sees the bankrupt debtor trading with all the world, and makes no claim whatever against him, or interferes in any way with his proceedings, I must take it for granted, that, if the creditor had any right to interfere, he has by his passive acquiescence abandoned it. But what was done all this time by the petitioner's colleague, the other assignee? It appears that he, for four years before his death, knew that the bankrupt was carrying on business at Manchester, and was quite as passive a spectator as the present petitioner. Under all these circumstances, I am of opinion, that the petitioner has not succeeded in establishing his right to the property, and that it is vested in the assignee under the third fiat.

With respect to the freehold property, I think the principle of equity applies as well to the real, as to the personal estate, notwithstanding the 72nd section

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does not apply to real property. It follows, that the creditors under the fiat are entitled to a priority in the distribution of the effects in the hands of the assignee under that fiat, but that in the event of a surplus, the same will revert to the claimants under the second commission.

As to the costs, the petitioner, it seems, prevailed in staying the dividend under the fiat, when his petition was before the Court on the former occasion; his conduct has been not vexatious, though unfortunate; and therefore I think that the costs of both parties, as well on the petition as on the inquiry before the registrar, should come out of the estate under the fiat.



Ex parte MOULD.—In the matter of THOMAS
HARRIOTT. —

Serjeants' Inn,
Aug. 2.

A petition for rehearing will be dismissed, unless some new fact of importance is stated to have been discovered since the former hearing.

THIS was a petition for rehearing, and praying also that the Order made on the previous hearing might be discharged, and that a particular person might be examined *vivâ voce*. The original petition was by an equitable mortgagee, to establish a mortgage of the equity of redemption of part of the bankrupt's estate; when the Court made the usual Order. The present petition was accompanied by an affidavit, containing various allegations as to the invalidity of the deed, on which the mortgage was founded; and that the bankrupt, on the former occasion, refused to make any affidavit.

Mr. Koe, in support of the petition, submitted that this application must be treated, as in the nature of a bill of review to the Lord Chancellor. [Sir John Cross. Which bill of review must state some new fact, which

has been discovered since the former Order was made.] The rule of the Court of Chancery is, that when a party was incapable of producing evidence when the cause was heard, the Court will, if satisfied of his inability on the former occasion, let him in to produce that evidence on a rehearing of the cause, and grant him an Order for that purpose. There was here no want of diligence, on the part of the solicitor for the respondent, on the former occasion. If the affidavit, which impeaches the validity of the mortgage deed, had been obtained before the former hearing, the Court would not have made the former Order. The object of the present application is, that the Court would either direct an issue, or order a *vivâ voce* examination, for the purpose of bringing *Thomas Harriott* before the Court, who refused to make any affidavit on the former occasion.

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Mr. *Bacon*, *contrâ*.

Sir JOHN CROSS. If this petition had stated any new fact, or if any thing had been discovered since the former hearing,—that might have afforded some grounds for this application; but there is nothing here alleged, which might not equally have been alleged at the former hearing. There was no application then made to adjourn the hearing of the petition; and the respondent now comes back to this Court, and petitions that the Court will reverse what it has done, on the sole ground that he is now furnished with an affidavit of some party, stating that the deeds, which were established in evidence on the former hearing, and on which the Order of the Court was founded, are fraudulent and void. I

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never heard of such an application, either in a court of law or equity, or in this Court. The petition must therefore be

Dismissed, with costs.

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The plaintiff in an action at law obtains a judge's Order for payment of the debt and costs on a particular day, in default of which he is to be at liberty to sign judgment; but the defendant not being able to pay the debt at the time specified, the plaintiff extends the time of payment, before the expiration of which the defendant becomes bankrupt, and the costs are not taxed until after his bankruptcy. Held, that the plaintiff could prove for the amount of the taxed costs, as well as for the principal sum.

Ex parte JOSEPHUS FERRIS.—In the matter of TIMOTHY BOURNE.—

THIS was a petition of the public officer of the Western District Banking Company for the proof of a debt amounting to the sum of 325*l.* 3*s.* 8*d.*, and for 39*l.* 6*s.*, the amount of the taxed costs in an action brought by the company for the recovery of the debt, in which action they obtained the following judge's Order :

" Upon hearing the attornies or agents for the plaintiff, and the defendant in person, and by consent, I do order, that upon payment of 325*l.* 3*s.* 8*d.*, the debt due from the defendant to the plaintiff for which this action is brought, together with costs to be taxed, on the 6th of November next, all further proceedings in this cause be stayed. And I further order, that in case default be made in payment as aforesaid, the plaintiff shall be at liberty to sign final judgment, and issue execution for the whole amount remaining unpaid at the time of such default, with costs of judgment, registering the same, and execution, sheriff's poundage, officer's fees, and all other incidental expenses, whether by *fieri facias*, or *capias ad satisfaciendum*. Dated the 30th July 1841.

E. H. Alderson."

The bankrupt, not being able to pay the debt on the day mentioned in the judge's Order, requested further

time until the 20th December 1841 for that purpose; in consequence of which application, the company delayed to sign final judgment.

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FERRIS.

On the 13th December 1841, the fiat issued.

After the issuing of the fiat, the costs of the plaintiffs in the action were taxed at 39*l.* 6*s.*; and on the 24th December 1841 the plaintiff signed final judgment for the debt and costs, amounting together to 364*l.* 9*s.* 8*d.* This sum the company applied to prove under the fiat; but the Commissioners thought their right of proof involved in so much uncertainty, that they considered it their duty to refer the parties to the Court of Review; observing, that had the plaintiff in the action used due diligence, he might have obtained the judgment in time. And they adjourned the declaration of a dividend, to allow time for the petitioner to obtain the Order of this Court.

Mr. *Anderdon*, in support of the petition. The petitioner in this case rests his right of proof on the 6 *Geo.* 4. c. 16. s. 58., which provides that "if any plaintiff in any action at law or suit in equity, or petition in bankruptcy or lunacy, shall have obtained any judgment, decree, or order against any person who shall thereafter become bankrupt for any debt or demand in respect of which such plaintiff or petitioner shall prove under the commission, such plaintiff or petitioner shall also be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy." It is presumed that the difficulty of the Commissioners related to the right to prove for the 39*l.* 6*s.*, the amount of the costs; but it is clear from this section,

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that the costs may be proved, notwithstanding they are taxed after the bankruptcy. And even where a verdict was obtained subject to a reference, and the award was not made until after the bankruptcy of the defendant, it was held that the costs were proveable under the commission; *Ex parte Helm (a)*.

Mr. *Kenyon Parker*. The question is, whether the Order of one of the Barons of the Court of Exchequer is equal to a verdict at *nisi prius*. By the terms of the Order, the petitioner, who was the plaintiff in the action, was to be at liberty to sign final judgment, and issue execution, in case default should be made in payment of the debt and costs on the 6th of November 1841. But the petitioner, instead of signing judgment (as he might have done) on the 6th of November, gave time to the defendant; and the question is, whether, as he has not used due diligence in obtaining judgment and taxing the costs before the bankruptcy, but has extended the time beyond the day specified in the judge's Order, he can now prove for the costs. There is also another objection to the right of proof—that this was a joint debt, and not a separate debt.

Mr. *Anderdon*, in reply, was stopped by the Court.

Sir JOHN CROSS.—It appears to me, that the Order of the judge was equivalent in this case to a verdict at law. But it is objected, that the plaintiff gave time to the defendant for the payment of the money beyond the day specified in the Order, and that he thus by his own act prevented the costs from being taxed before the bank-

(a) 1 Mont. & M. 70.

ruptcy. But I do not think, that that circumstance affects his right of proof for the costs. In *Ex parte Poucher* (a) the Vice-Chancellor says, "It seems to me, upon authority as well as upon principle, that where, in an action founded upon contract, there is a verdict before bankruptcy, and judgment afterwards, there the costs, *de incremento*, are proveable; having, in effect, been incorporated with the existing debt by the verdict, though not ascertained in amount till the judgment." Upon the authority of that case, I think the costs may here be proved, as well as the principal debt.

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ORDERED as prayed; costs of the assignees to come out of the estate (b).

(a) 1 G. & J. 385.

(b) See *Hawell v. Thorogood*, 7 B. & C. 705, where Lord Tenterden says, "The rules deducible from all the cases are laid down in Mr. Deacon's *Treatise on the Law of Bankruptcy*, and after stating the rules applicable to cases, where the plaintiffs have obtained verdicts, and the defendants have become bankrupt before judgment, he says, 'With respect to costs upon a judgment of nonsuit, the statute (6 Geo. 4. c. 16) is wholly silent, making no provision whatever for the proof of a defendant's costs, whether on a judgment of nonsuit, or judgment after verdict. It was, indeed, formerly determined, that where the nonsuit was before the bankruptcy of the plaintiff, the costs might be proved, though the judgment was not obtained till afterwards, on the ground that the costs related back to the nonsuit, by virtue of which the debt might be said to exist before the bankruptcy. But this position is to be found only in two of the cases, which were impugned by Lord Eldon in *Ex parte Hill*, 11 Ves. 646, and which were overruled in *Ex parte Charles*, 14 East, 197. And it has since been decided, that where a defendant obtains a verdict, and the plaintiff becomes bankrupt before judgment is signed, the costs cannot be proved under the commission, on the principle that no debt arises in such case, until judgment is signed; *Walker v. Barnes*, 5 Taunt. 778.' That is, I think, a correct statement of the decisions upon the subject."



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Ex parte THOMAS BENSON, WILLIAM JOHN CHAPMAN BENSON, and WILLIS ALLATSON BENSON.—In the matter of DANIEL WADE ACRAMAN, WILLIAM EDWARD ACRAMAN, and ALFRED JOHN ACRAMAN.—

Serjeants' Inn,
August 2.

A., B., and C., who are in partnership, are joint owners of a ship with D., the managing owner, who contracts a debt with the petitioners for goods supplied for the use of the ship. A. B. and C. become bankrupt. Held, that the petitioners could not prove against their joint estate, but only against the separate estate of each of the bankrupts.

THIS was a petition for the proof of a debt, which had only been admitted in a limited degree by the Commissioners.

The bankrupts who were partners, were the registered owners of fifty-six sixty-fourth parts or shares of two several ships called the *William Money* and the *Thames*, and *William Green* was the registered owner of the other eight sixty-fourth shares, and was also the managing owner. In the years 1840 and 1841, *Green*, as such managing owner, and on behalf of himself and the other owners, contracted with the petitioners, who were sailmakers, for the supply of sails and canvass for the purpose of fitting out the ships on a voyage to the East Indies; which were accordingly supplied by the petitioners to the amount of 580*l*. For this sum the petitioners tendered a proof against the joint estate; but the Commissioners only admitted it, for the purpose of enabling them to vote in the choice of assignees, and to exercise their discretion as to signing the certificate of the bankrupts; assigning as a reason for excluding the petitioners from any dividend on such proof, that *Green* was liable jointly with the bankrupts, and that as he was solvent, no proof for the purpose of receiving a dividend could be made by the petitioners against the bankrupts. The petition alleged, that the bankrupts were not connected with *Green* in any trade or business, than as being respectively part owners of these ships.

The prayer was, that the Commissioners might be directed to receive the proof against the joint estate, as one in respect of which dividends were to be paid to the petitioners; and that the limitation of the effect of the proof, which was indorsed thereon, might be cancelled.

Another point was raised by the assignees in an affidavit, filed by them in opposition to the petition, namely, that the ships which had been sent out on a venture, were earning freight, which was claimed by *Green*, in discharge of the liabilities he had contracted on the outlay of the ships.

Mr. *Wood*, in support of the petition. The bankrupts and *Green*, though part owners of the ships, are not to be considered as partners. And with respect to the freight, if any such were earned by either of the ships, it cannot be said that that is joint estate. [Sir *John Cross*. The freight is no more joint estate, than the ships were.] In *Ex parte Young (a)*, Lord *Eldon*, after mature deliberation, overruled the decision of Lord *Hardwicke* in *Doddington v. Hallett (b)*, and lays down the rule, that a ship is not to be treated as joint property, and therefore not liable for the debts of the ship-owners; in short, that it was not joint estate distributable amongst joint creditors. No doubt, the law implies a joint liability of the owners of a ship to a party who supplies goods for the ship's use. But joint contractors are very different from partners; and the rule, that proof cannot be made on a joint debt, if there is a solvent partner, only applies to actual partnership; *Ex parte Crosfield (c)*, *Ex parte Bauerman (d)*, *Ex parte Buck-*

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Ex parte
BENSON
and others.

(a) 2 Ves. & B. 242.

(c) 2 Mont. & A. 543; 1 Deac. 405.

(b) 1 Ves. 497.

(d) Mont. & Ch. 569; 3 Deac. 476.

1842.

 Ex parte
 BENSON
 and others.

ingham (a). In the present case, therefore, the Commissioners were wrong in deciding that the petitioners could not prove against the estate of the bankrupts, because *Green*, the other co-contractor, was solvent; for it is clear, that these parties being joint owners of a ship, were merely joint contractors, and not partners. The Commissioners have admitted the petitioners to prove, under the 62nd section of the 6 *Geo.* 4. c. 16., merely for the purpose of voting in the choice of assignees, and assenting to or dissenting from the certificate; but the petitioners repudiate that proof.

Mr. *Anderdon*, for the assignees. The point in this case is entirely new. I contend, that there is outstanding joint property, and cannot agree to the proposition urged on behalf of the petitioners, that, because the ships are not joint property, the freight therefore is not so. In all actions for the recovery of freight, the action must be brought in the names of all the ship owners. The cases cited have no application, for the 62nd section puts the petitioners out of Court. The parties were liable respectively as joint owners, not in partnership, but as against each member of the bankrupt firm as a part owner. If, therefore, any right of proof can be founded on the proposition urged by the other side, it must be against the bankrupts, in the character of separate owners, and cannot stand as a proof against the joint firm of the three. But a separate creditor cannot come in competition with the joint creditors, nor can a joint creditor, while there is one sixpence of joint property to be administered, prove against the separate estate.

(a) 1 Mont. Deac. & D. 235.

Mr. *Wood*, in reply.

1842.

Ex parte
BENSON
and others.

Sir JOHN CROSS. This is a case of joint contract by four persons; and the petitioners ask to prove, against the joint estate of three of the four joint contractors, for the amount of the debt contracted by the four. This certainly cannot be done. The petition must therefore be dismissed, with costs.

Petition dismissed, with costs.

Ex parte T. D. TAYLOR.—In the matter of THOMAS
MORGAN.—

*Court of Bank-
ruptcy,
Basinghall
Street,
29th October.*

THE question in this case was, whether a joint creditor of the bankrupt and his late copartner, who had proved his debt against the separate estate of the bankrupt, was entitled to receive dividends on his proof. The point had been argued before one of the learned Commissioners of the Court of Bankruptcy, who now delivered the following judgment :

*A. and B. dis-
solve their part-
nership, when
B. assigns all
the joint prop-
erty to A.,
among which
are debts due
to the firm,
to the amount of
69*l.*; but no
notice of the
assignment is
given to the
debtors. A.
and B. severally
become bank-
rupt. Held,
that a joint cre-
ditor, who had
proved under
the separate fiat
against A., was
entitled to re-
ceive dividends
on his proof.*

Mr. Commissioner EVANS. In this case, the bankrupt and his brother had been in partnership together. They dissolved partnership on the 30th September 1841, and it was regularly gazetted. All the partnership property was assigned to the bankrupt, who covenanted to discharge all the debts due by the partnership. Amongst the other assets of the partnership, there were debts due to the firm; no notice of such assignment was given to the debtors; the value of such debts is about 50*l.*; both partners have become bankrupt; this bankrupt in April

1842.

Ex parte
TAYLOR.

1842, and the other in May 1842. The creditor, who seeks to receive a dividend on his proof, was a creditor of the two; and he claims, on the allegation that there is no joint property or solvent partner. His demand to receive dividends is resisted, on the ground that the debts already mentioned constituted joint property, no notice of the assignment having been given to the debtors. The partnership having been dissolved before the bankruptcy, the 62nd section of 6 Geo. 4. c. 16. does not apply, according to the case of *Ex parte Morris* (a), which appears to me correctly decided. The rule established by a variety of cases is, that a joint creditor cannot prove on the separate estate of one of his debtors for the purpose of receiving dividends, unless there was no joint property or solvent partner, in which case the joint creditor might prove and receive dividends. This exception appears to me to be framed to meet such cases as the present, where, by dissolution of the partnership and assignment of the partnership property, the joint creditors are deprived of that fund, which they themselves had helped to form, and to which they looked for payment. Were it not for the question of the debts assigned, the right to receive dividends appears clear. For what could be more unjust, than that the separate creditors under this estate should possess themselves of all the property of the joint creditors, and that the joint creditors should not in any way participate in it?

The whole question therefore is, whether these debts can be considered joint property. If the assignment was made *bonâ fide*, and that is not questioned, the partnership property became the separate property of the bank-

(a) 1 Mont. 208.

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rupt; *Ex parte Ruffin*(a), *Ex parte Williams*(b). Had both the partners remained solvent, whose property would they be but the bankrupt's? It is true, that, if a joint fiat were taken out against both the partners, these debts would pass, as being in the use, order, and disposition of the two; but that would not make them the joint property of the two. The debtors, whose debts were assigned, could not now dispute successfully paying their debts to the assignees of this bankrupt. In equity, the consent of the debtors is not necessary, to make the assignment of the debt valid. Even if these debts could be considered joint property, or *quasi* joint property, the next question is, whether it is such property as ought to defeat the joint creditors' claim. In the case of *Ex parte Peake*(c), Lord Eldon says, "If, in point of fact, there is joint property, whether to the amount of 5*l.* or 5*s.*, it is an answer to this application. Convenience requires that the established practice of the Court should be understood and adhered to. If the property alleged to exist in this instance be of such a nature, and in such a situation, that any attempt to bring it within the reach of the joint creditors must be deemed as desperate, or in point of expense an unwarrantable attempt, that would authorise a departure from the rule; in truth, there would then be no joint property." To the same effect is *Ex parte Birley*(d).

In *Ex parte Hill*(e), Lord Eldon says, "joint effects means such as are under the administration of assignees to administer; not, as in this case, where the only joint effects are those pledged to the petitioner." In this

(a) 6 Ves. 119.

(b) 11 Ves. 3.

(c) 2 Rose, 64.

(d) 2 Mont. Dea. & D. 354.

(e) 2 New Rep. 191, note (a).

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case, it is perfectly clear, that, if a joint fiat were sued out, the creditors could never receive one farthing.

For these reasons, I should decide, that the joint creditors in this case ought to be admitted to receive a dividend on this separate estate; but the case of *Ex parte Leaf* (a) is a decision expressly in point, and contrary to the decision I should otherwise feel myself called upon to make; and were that case uncontradicted, I should, after having expressed my dissent, have notwithstanding refused the application, in deference to that authority. But in a case of *Ex parte Glascott* (b), which is reported in the *Jurist*, and which report I have ascertained to be correct, the Court of Review is reported as having decided that debts, similarly circumstanced as the present, are not the joint property of the original partners; at least, that is the conclusion I draw from it, as the petition states, "that under any circumstances it is submitted, that even should it be decided that your petitioners, the said *Mary Glascott*, *George Minshaw Glascott*, and *Thomas Glascott*, are not entitled to the proceeds of the stock, yet they are nevertheless entitled to the book debts of and belonging to the said joint estate of the said bankrupts, unless it can be shown, that the debtors from whom the said book debts are owing had notice of the assignment;" and the petition was wholly dismissed. As it appears to me, that the Court is correct in its last decision, I think I am not infringing the rule I have laid down as to interfering with the decisions of the superior Courts, by allowing the creditors in the present case to receive dividends.

I should be very sorry to have it supposed I have any

(a) 1 Deac. 176.

(b) See *Ex parte Gurney, re Glascott*, ante, p. 541.

doubt, that in case such joint fiat had issued, these debts would not pass, as being in the use, order, and disposition of the two, or that any other evidence would be necessary than that of the debtors. The debtors believed, that the debts due by them continued the property of the two. And what would have been the result of a notice of assignment being given to the debtors? The necessary result would have been, that these debtors would have immediately known that the assignor was in difficulties, and would have communicated that opinion to all persons who asked their opinion. So, in the case of a policy of insurance on the life of a person, if such person assign it, and do not give notice to the office, the directors or clerks believe him to be the owner, and would state such to be the fact to any persons inquiring as to his circumstances; but if notice of such assignment were given, the result would necessarily be, that the directors or clerks would consider him a man in difficulty, and would so represent him to any person making inquiries as to his circumstances.

Nothing in my judgment can be more fatal to the morality and prosperity of the trading community, than the encouragement of secret assignments of property or fraudulent preferences.

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*Westminster,
November 3.*

Where a Commissioner refused to adjudicate the bankruptcy, because he was not satisfied with the evidence of the trading, which appeared to the Court to be sufficient; it was recommended that the matter should be submitted to the decision of a Sub-Division Court.

Seemle, that the member of a gas company is a trader.

Ex parte BROWN.—In the matter of JAMES
PUTTOCK.—

THIS was a petition of the creditor who had sued out the fiat, praying that the Court would declare that the evidence taken before the Commissioner was sufficient to enable him to declare the party a bankrupt, or that the Court would direct the fiat to be referred to some other Commissioner. The fiat issued on the 26th of June, describing the bankrupt as "of Epsom, in the county of Surrey, Scrivener, Gas-man, Dealer and Chapman." It appeared that the bankrupt held ten shares in "the Epsom and Ewell Gas Company;" which was established in June 1839, for the purpose of lighting those places with gas. The company was not incorporated by charter or act of parliament, but was formed by a joint stock deed of copartnership, and consisted of certain holders of three hundred shares at 10*l.* each, who with the bankrupt signed the partnership deed. There was no dispute as to the petitioning creditor's debt, or the act of bankruptcy, which were clearly established; the only question being in regard to the trading. It was proved by the secretary of the company, that the business commenced in 1840, and consisted in buying large quantities of coal, from which they extracted gas, and contracted with the inhabitants of Epsom and Ewell for the supply of gas, from which the company derived an annual profit. It was also sworn by another witness, who was well acquainted with the dealings of the company, that, besides the gas, they manufactured tar and coke, which they sold to various customers, and that they also bought lamps and gas-meters, which they let out to hire. The Commissioner thought that this was not


satisfactory evidence of the trading, and refused to adjudicate.

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Mr. *Bacon*, in support of the petition. The Commissioner's refusal to declare the party a bankrupt has left the petitioner no alternative, but to come to this Court; not asking an adjudication, but a reference to another functionary to adjudicate on the trading; the evidence of which, it is submitted, is quite sufficient.

Sir JOHN CROSS. This is the first case of the kind, that has occurred since the establishment of this Court. I do not give any opinion at present on the case; but if the Commissioner was wrong, the petitioner had certainly no remedy but to come to this Court; for the refusal to adjudicate would amount to a denial of justice, if this Court could not interfere. Mr. *Barber* informs me, that two or three cases of this kind have occurred before Lord *Eldon*, who, though he feared to encourage other applications of a similar nature, nevertheless gave relief, by directing the commission to another list of Commissioners. Here, without deciding whether the party was a trader, or not, there is clearly a case deserving consideration. I should recommend that the matter should, in the first instance, be submitted to the Sub-division Court; and the learned Commissioner, will probably, on its being mentioned to him, make such an arrangement. If requisite, the matter may be mentioned again.



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Westminster,
Nov. 3.

Certificate
allowed, where
the bankrupt
was abroad, on
the production
of an affidavit
of a third party
that the signa-
tures of the cre-
ditors were pro-
perly obtained.

In the matter of BENJAMIN WATERHOUSE.—

MR. *Bacon* applied to the Court for an Order, that the bankrupt's certificate might be allowed, without the production of the usual affidavit of conformity, required from the bankrupt. The fiat issued in April 1836; and it was sworn, that the bankrupt had been for several years absent from this country, and was at present engaged in a merchant vessel on the coast of China. The certificate is dated on the 29th October last. In *Ex parte May* (a), where the bankrupt was, by reason of lunacy, incompetent to make the usual affidavit of his certificate being obtained without fraud, it was allowed to be made by some other person. In the present case, a solicitor, employed by a relative of the bankrupt's, has made an affidavit, that the signatures of the several creditors, who have signed the certificate, were obtained fairly and without fraud.

Sir JOHN CROSS. I think that will do; and that, on the production of this affidavit at the office, the certificate may be allowed.

(a) *Ante*, 381.

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Ex parte SAMUEL HENRY THOMPSON, THOMAS STEUART GLADSTONE, MURRAY GLADSTONE, MILLICENT ANNE HINDE, ROBERT GLADSTONE and FRANCES GEORGINA GLADSTONE his Wife, and CHARLOTTE AUGUSTA HINDE.—In the matter of ROBERT DERHAM, WALTER ALAN HINDE, and JAMES DERHAM.

Before
Sir George Rose,
Dec. 28, 1841,
and
Jan. 17, 1842.

THIS was a petition for leave to enter a claim for 54,000*l.* against the joint and separate estates, and a claim for 3000*l.* against the separate estates of two of the bankrupts, and for an order to stay the dividend until the hearing of a cause in which the petitioners sought to establish a lien upon part of the estate of the bankrupts.

In June 1829, *William Hinde*, since deceased, entered into partnership with the bankrupts, for the purpose of carrying on the business of worsted-spinners, he having for some time previously carried on a similar trade in partnership with other persons. At the time of his entering into partnership with the bankrupts, he was entitled to certain freehold and leasehold estates, mills, warehouses and machinery which were used for the purpose of carrying on the business both by the former and the new partnership.

By a partnership deed a partner entitled to one-fourth of the capital and profits engages to furnish more than his proportion of the capital, if required, it being agreed that the excess should at his death be secured to his representatives by a mortgage on the partnership property, he having power to appoint by will one or more of his sons to succeed to his fourth part. By his will he appoints such of his sons to succeed him as should be selected by his widow and one of his partners,

whom he appoints his executrix and executor, but directs, that, during the minority of the sons, and after providing for their maintenance, the surplus profits of his share should fall into his residuary estate. At his death, the sons being minors, the business is carried on as before, the testator's representatives taking his place, but not taking or calling for any security for the debt due to his estate in respect of the excess of capital advanced by him. On the widow dying, and the surviving partners becoming bankrupt, *Held*:

1. That there could be no right of proof on behalf of the testator's estate against the joint estate of the surviving partners, in respect of this debt.

2. That, even if there could, those interested in the testator's estate were not entitled to have the dividends stayed, or a fund reserved, till the hearing of a cause which was to decide upon their right to a lien on the partnership property, in respect of this debt; the legal right of the general body of creditors to a dividend never being delayed at the instance of a creditor claiming a preference, except in clear cases, or where his equity is manifestly preponderant.

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Articles of partnership were accordingly executed to the following effect :

First, it was provided, that the partnership should continue till June 14th 1845, and that the freeholds and leaseholds, mills, warehouses and machinery should be considered as divided into twenty equal parts, and as belonging to the partners in the following proportions, namely, $\frac{1}{20}$ ths to *William Hinde*, $\frac{3}{20}$ ths to *Robert Derham*, $\frac{3}{20}$ ths to *Walter Alan Hinde*, and $\frac{3}{20}$ ths to *James Derham*.

The fourth clause provided, that *William Hinde* should from time to time, in addition to the sum or sums to be advanced by the other partners, advance such further sum as might be necessary for carrying on the trade.

The fifth clause provided, that the other partners should from time to time advance such sum as they should respectively find it convenient to do.

The sixth clause permitted *William Hinde* to withdraw capital in proportion to the advances made by the other partners, and that in the mean time the sum of 61,846*l.* 10*s.*, being the value of the real and personal estate, stock in trade and effects, should be considered as the capital of *William Hinde*.

The tenth and eleventh clauses gave each partner 5*l.* per cent. per annum on his capital, and, in addition thereto, certain fixed annual sums for his personal services ; the latter sums to be paid, without regard to the amount of the profits or loss of the joint trade, or even if there should not be any such profits. Subject to these payments, the profits were to be divided into twenty equal parts, eleven of which were to belong to *William Hinde*, three to *Walter Alan Hinde*, three to

James Derham, and the remaining three to *Robert Derham*.

By the thirteenth clause it was provided, that any one or more of the partners might, with the consent of the others of them, advance to the joint trade any further sum of money, which was to be a charge on the capital stock and profits of the partnership, and to bear interest.

The twenty-fifth clause provided, that, in case of the death of any of the parties before the expiration of the term limited for the duration of the partnership, the surviving partner should, from time to time during the residue of the term, pay to the widow or children of the deceased partner, as he by his will should direct, for the benefit of his widow and children, a certain annual sum, such sum, in the event of the decease of *William Hinde*, being the annual sum of 400*l*.

The twenty-sixth clause provided, that, if *William Hinde* died before the expiration of the partnership, leaving a son or sons, he should be at liberty to nominate or appoint such son or sons to succeed him to $\frac{5}{10}$ th parts of the joint trade, and the capital and future gains and profits thereof; but neither his sons, nor his representatives, were to be at liberty to interfere in the management of the affairs of the partnership; and one-fourth of the profits was to belong, in that case, to such son or sons; and the other three-fourth parts to *Walter Alan Hinde*, *James Derham*, and *Robert Derham*.

The twenty-eighth clause provided, that, in case of the decease of *William Hinde* before the expiration of the partnership, the surviving partners, if two or more of them should be then living, should take and purchase the share and interest of *William Hinde* in the freehold and leasehold estates belonging to the partnership, and

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the machinery, utensils, stock in trade, debts and effects thereof, not disposed of to any of his children, at such sum or sums of money as the same were or appeared to have been valued at the time of the last annual valuation thereof; and such surviving partners should, within one month next after such decease, or as soon afterwards as circumstances would permit, execute to the executors or administrators of *William Hinde* a good and sufficient mortgage or mortgages of the freehold and leasehold estates of the partnership, subject to any existing incumbrances, and also the joint and several bond of the surviving or continuing partners, for securing to the executors of *William Hinde* his share of the partnership estates, stock and effects, with interest at 5l. per cent. per annum, in addition to the annual sum payable to his widow, in manner following, viz. 1500l. at the end of each succeeding year, with interest; provided that no yearly payment of the said capital of *William Hinde* should be made, or become payable, to his executors or administrators, until the year 1835; and that, if there should not be two of the partners living at his decease, the partnership should be dissolved, as if it had expired by effluxion of time.

The thirty-first clause provided, that, upon the giving and executing of such mortgage and bonds as aforesaid, the heirs, executors, or administrators of the deceased partner should convey, assign, and assure the part or share, and all the estate, right, title and interest of such deceased partner of and in the freehold and leasehold estates, machinery, stock, debts and effects, and the profits and gains of the then current year in which such partner died, unto the surviving partners, their or his executors, administrators, or assigns, or as they should direct and appoint.

Upon the execution of these articles, the freehold estates were conveyed by *Wm. Hinde*, so as to become vested, as to $\frac{1}{2}\frac{1}{6}$ ths in himself, and as to the other $\frac{9}{20}$ ths in his partners equally. By a memorandum dated Feb. 7, 1832, and signed by the partners, some alterations were made in the articles; and, among others, it was provided that *William Hinde's* share should be $\frac{5}{20}$ ths, *Robert Derham's* $\frac{6}{20}$ ths, *James Derham's* $\frac{5}{20}$ ths, and *Walter Alan Hinde's* $\frac{4}{20}$ ths. And it was agreed that *William Hinde's* capital was not to be commenced paying out until six years after his death, but if a sum from £——(a) to £5000 should be required before, the concern were to use their best endeavours to pay out the same. Upon the execution of this memorandum, corresponding conveyances were made of the freehold estates of the concern.

The partnership was carried on, in conformity with these articles, till the death of *William Hinde*, who by his will, referring to the power given him by the articles to dispose of $\frac{5}{20}$ ths of the profits of the concern, declared it to be his desire, that the business might be conducted and carried on by his surviving partners in such manner as would be most conducive to the interests of themselves and families, as well as to the interest and advantage of the testator's own family; and he directed that the share and interest reserved for his sons might be divided or appropriated to and for the use of the whole, or any two or one of his sons, in such shares and proportions, and at such time or times, and in such manner and subject to such alteration and restriction from time to time during the remainder of the term, as the testator's wife and *James Derham*, and the survivor of them, might think expedient and proper, and as circum-

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(a) This was left in blank.

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stances and the conduct of the testator's sons, or any of them, should warrant. The testator however declared his then present intentions to be, that, if his son *Thomas Foster Hinde* should live and conduct himself properly in business, he should have the whole of the said five-twentieth shares on attaining twenty-one, being charged with interest for the capital belonging to the testator's estate; and that no more of the profits were to be paid to the use of the testator's sons during their minorities than should be necessary for their maintenance and education, but that the residue thereof, if any, should accumulate and form part of the residue of the testator's estate and effects; and, on the expiration of the copartnership, or upon any renewal or alteration thereof, the testator desired that some one or more of his sons, if then living, might be admitted to a share or shares of the said business upon fair and equitable terms. And the testator appointed *Ann Hinde, William Lambe, James Derham, and Robert Derham* executors and trustees of his will.

William Hinde died January 14th, 1834, and the will was proved by *Ann Hinde*, his widow, and *James Derham*, alone. The children of *William Hinde*, who survived him, were all infants at the time of his death, except *Millicent Ann Hinde* and *William Buckley Hinde*, the latter of whom died a few months after his father. No mortgage or bond was given by the surviving partners to the representatives of *William Hinde*, for the amount of his share and interest in the partnership estates, stock in trade, or effects at the time of his decease; nor did it appear that his personal representatives ever required that any such mortgage or bond should be given. The partnership business was carried on by the surviving partners, one of whom also acted as

partner in his capacity of personal representative of *William Hinde*. Immediately on the death of *William Hinde*, an account was opened with the partnership in the name of his executors in the private ledger, in which account his estate was credited with interest on the amount of capital from time to time considered as his estate, and also with $\frac{5}{20}$ ths of the net profits, and debited with $\frac{5}{20}$ ths of the loss.

Ann Hinde died in June 1835; and on the 23d Dec. 1839 the fiat was issued.

The petitioners, except *Robert Gladstone*, as representing in part the residuary estate of *William Hinde*, together with *Joshua Bryer Hinde*, filed a bill in Chancery against the surviving executor and the assignees to have the will established and the trusts thereof carried into effect, and for the administration of the estate, and to have the benefit of an equitable lien or charge on the freehold and leasehold property and machinery of the partnership for the amount due to the testator's estate from the partnership; and for a sale; and, in case of deficiency, that the parties interested in the residuary estate might be declared entitled to stand as creditors for the amount of such deficiency against the joint estate of the bankrupts, and also against their separate estates respectively, and for the appointment of some one to prove for such amount under the bankruptcy; and that, until the amount could be ascertained, the assignees might be ordered to set apart a sufficient sum to answer the amount of the said debt, or that the plaintiffs might be authorised to enter a claim against the bankrupt's estate for such amount.

Application, also, had been made to the Commissioners to admit the claim of the petitioners, which

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the Commissioners declined to do. They however postponed making a dividend, to afford the petitioners an opportunity of getting the suit in Chancery heard. But, before the hearing could take place, the assignees advertized dividend meetings on the joint and separate estates of the bankrupts for the 29th and 31st days of December 1841; whereupon the present petition was presented, praying that the Commissioner might be directed to allow a claim to be enforced on behalf of the estate of *William Hinde*, as well against the joint as against the separate estates of the bankrupts respectively, or otherwise against their separate estates, for 54,000*l.*, and to reserve a sufficient sum to answer the dividends upon the amount of such claim, in case it should be proved as a debt; or that the Commissioners might be ordered to suspend the declaring of any dividends till after the hearing of the cause of *Thompson v. Derham*.

Dec. 27, 1841.

The petition came on, by special leave, to be heard before Sir *George Rose* on the 27th of December 1841, when his Honour dismissed the petition, and ordered the costs of the assignees to be paid out of the estate. On the 30th of December 1841 the plaintiffs in the Chancery suit applied by motion to Vice-Chancellor *Wigram* for an injunction to restrain the assignees from paying any dividends until the hearing of the cause; but the Vice-Chancellor, without deciding whether he had jurisdiction to interfere (a), refused the motion; whereupon the petitioners applied to the Court of Review for a rehearing of the present petition, which now came on to be reheard accordingly.

(a) See 1 Hare, 358.

Mr. *Russell*, and Mr. *Mylne*, were in support of the petition.

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Mr. *Bethell*, and Mr. *Barlow*, for the assignees.

His Honour intimated his opinion, that, if the question were still brought before him upon the right of the petitioners to prove, as asserted upon their former application,—or upon their unqualified right to prove, without such direction incidental and essential to their claim, as the due administration of assets in bankruptcy required,—he must leave them to work out their equities in the cause, and could not interfere. But that, if they considered it advisable to amend the prayer of the petition, so as to ask for such directions as the case required, he would permit the petition to stand over for that purpose, restraining the assignees in the mean time.

At the instance of the petitioners, and with the consent of the assignees, it was then agreed that the petition should be taken as so amended. It was accordingly re-heard; and it was agreed, that, in settling the minutes of the order, the undertaking to amend, and the general demand for relief as to the Court might seem right, should be taken as virtually to sustain the Order.

Sir GEORGE ROSE(a).—The circumstances stated upon this application present a case of some complexity, but

(a) The hearing of this case having taken place at his Honour's private house, the Reporters were not present when the above judgment was delivered; but they have been furnished with the shorthand writer's transcript of it, which has been kindly revised by his Honour.

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of no very great difficulty, whether it is to be regulated upon the principles and practice peculiar to a mere question of particular proof, or upon the principles and practice applicable to marshalling between *classes* of creditors, and *classes* of estates, in the administration of assets by assignees, as officers of the Court, and as trustees amenable to the jurisdiction in bankruptcy. In that latter mode of dealing with it, the judge must endeavour to place himself precisely upon the same ground as would sustain the directions of a Court of Equity, had the same questions between the same parties arisen in a suit. The facts are, that in June 1829, *William Hinde*, deceased, entered into partnership with *James Derham*, *Robert Derham*, and *Walter Allan Hinde*, the three latter persons being the parties under whose fiat this application is made. The partnership was established by articles of that date, and was to continue until June 1845. The property which constituted the capital, as far at least as it comprised the feeehold and leasehold buildings, utensils, and machinery, that is, the *corpus*, or plant, of its establishment, belonged to *William Hinde*. This he dedicated as capital to the concern in portions, of which, reserving $\frac{1}{3}$ ths to himself, he distributed the remaining $\frac{2}{3}$ ths amongst his partners. The business was commenced, and was carried on until the death of *William Hinde*, without any departure from the articles, either by express contract, or by contract to be implied; except that *the time* of taking the stock, a circumstance not material, was altered, and except that another alteration, in my opinion most material, was adopted, namely, that no part of *William Hinde's* capital was to be withdrawn *until six years after his death*. In the mean time, it was to remain, as in fact it did remain,

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subject to the interests created by his will, entitled, in the first place, to interest as a sum lent, and to profits as capital invested; surely a fact of some little importance in a question between parties claiming under the will of *William Hinde* against the creditors of that business, in which, by such his contract with his partners, the capital was to be so continued. Of the other covenants and provisions, it seems necessary to notice, that *William Hinde* was to bring into the partnership such further capital, in money, as might be necessary beyond the sums which the other partners were to bring in; and it was provided (surely a proviso most important in the same view of the case), as between the parties claiming under this will against the creditors, that, in the event of the death of any partner within the term, the surviving partners were to pay to the widow of the deceased partner an annuity, which, in the event of the death of *William Hinde*, was fixed at 400*l.*; and *William Hinde* might also appoint one or more of his sons to succeed him as to $\frac{5}{16}$ th parts of the business; such son, however, was not, nor was the representative of *William Hinde*, to interfere in the management of the partnership; but the other partners were to be at liberty to make such alterations in the style or firm as they should think fit. The profits of the partnership, subject to the allowances to widows, and the payment of interest, were to be divided into four parts, one of which was to belong to such son as should be taken into the business, and the remaining parts to the other partners, and their representatives. And then came the clause, upon which the great importance of this case had been deemed to depend, viz. that in case of the decease of *William Hinde* before the expiration of the term, the

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surviving partners should purchase his interest in the freehold and leasehold estate, machinery, utensils, stock in trade, debts, and effects, which should not be disposed of to any of his children, at such sum as the same appeared to have been valued at the time of the last stock-taking, and should, within six months after his decease, or as soon afterwards as circumstances would admit, execute to his executors or administrators a mortgage of the freehold and leasehold estates, part of the capital of the said partnership, and also their joint and severall bonds for securing to his executors the amount and share of the capital in the partnership estates, with interest at 5*l.* per cent. Let it here be observed, that this stipulation for giving the mortgage and bond was to secure capital, which it was also provided should remain in the concern for six years after the death of *William Hinde*,—and as during that time with participation of profits,—of course with the consequences which result from participation, and out of which profits, moreover, the widow of *William Hinde* was to receive 400*l.* a year. Under these articles the business was carried on until January 1834, when *William Hinde* died. The annual stock-taking in June preceding shewed the then account of his share and interest in the concern to be upwards of 41,000*l.*, and, of course, as between the parties themselves and their respective representatives, both executors and assignees, to be taken (save as far as under the provisions of the articles applicable to it they are at liberty to challenge its correctness) at that valuation. *William Hinde*, by his will, after adverting to the articles of copartnership, expresses his particular desire that the trade may be conducted and carried on by his surviving partners in such manner as might be most

conducive to the interest of themselves and families, as well as to the interest and advantage of his own family; and he expressed his wish, that one of his sons (without, however, naming which) should be taken into the business.

Now upon this it may be observed, that, if the effect of the articles of partnership was to leave (and I think it would be difficult to say that the effect of them was not to leave) the property of *William Hinde*, after his death, subject to the contingencies of the trade during such time that they were so continued with participation of profits,—it would be exceedingly difficult, from his will, to raise a different operation, or, as between the parties claiming under that will, and his personal representatives, participating in the profits of a business carried on in compliance with that will, to raise a breach of trust,—the very foundation of this application,—*à fortiori*, to raise a breach of trust against creditors entitled by operation of law, upon principles applicable to persons participating in profits of a trade, and applicable also to parties so participating, whether regarded as partners, either dormant or apparent. The question then arises, what are those principles, as applicable to the state of circumstances existent in this bankruptcy, both as to the property and to the individuals? *Ann Hinde*, the widow, and *James Derham*, then, and until now, one of the partners, proved the will. The business was continued as before, further than as qualified by the interest of the parties taking under the will of the deceased, of whom the widow and executrix was one. No mortgage bond was demanded nor given for the 41,000*l.*, the amount of *William Hinde's* share, ascertained at the last stock-

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taking. In 1835, *Ann Hinde*, and *James Derham*, the other executor, still continued in the uninterrupted business carried on in the same way, with accounts pending between it and the testator's estate; the testator's property still employed in it until December 1839, when the fiat issued; and we are, therefore, now to ask, what was the operation of law upon the testator's property so continued, and against the parties so continuing it? Have, or have not, the creditors of *the four* a right to treat the property so involved as assets of the trade, and the personal representatives so employing it as liable to them, as traders, with the usual election as against dormant partners? And have not the creditors of the four a right, if the property is to be taken, as I think it ought to be taken, as the joint property of the testator and his partners, to marshal their proof against the assets which thus constitute the capital of the firm; having regard to the right of election which a creditor has against a dormant partner, and to the question, how far so much of the property, as was of a mere chattel character, was within the order and disposition of the three? Now, looking at the state of things ending at this bankruptcy, the creditors admissible are, first, the creditors of the four; secondly, the creditors of the three, such, in either case, by direct contract, or by election against a dormant partner; thirdly, the creditors separately of the individual partners. The property to be administered amongst these classes of creditors is, first, the joint property of the four; secondly, the joint property of the three, of which, except by the effect of reputed ownership, there is probably none, and in that case, but little; and, thirdly, the separate properties of the individuals. The present petitioners, claiming under

the will, and through the legal title of the surviving executor,—he himself one of the partners, and one of the bankrupts,—endeavour to establish a proof against the *joint estate of the three*, and the *several estates* of the *individual* bankrupts. *Both* these proofs, under no state of circumstances, could they possibly accomplish. But have they a case of election? that is, have they a case of proof against the three? For, against the individuals, I think their claim, subject to regulation, is admissible. If I cannot see my way to a proof against the three, of course, I could not restrain the dividends (as here asked) as against the creditors of the three, upon a claim which presupposes a right ultimately to prove against those three, and which proceeds upon the mistaken ground, that, subject to the lien, the property of *William Hinde* had, at the bankruptcy, become the property of the three. On this supposition, they came before the Court in Bankruptcy, seeking to prove a debt, and at the same time insisting upon the benefit of a lien on property; asserting a right, after the deduction of the security which they were elsewhere enforcing against the general assets, by special interference and protection.

The first question, therefore, I had to consider, was, whether, as a mere question of provable debt, I could see my way to a proof? If I could not, upon what possible principle could I permit a claim to be entered, or could I restrain dividends under this fiat (now in operation since 1839) to the prejudice of the general creditors, whose legal rights ought not to be delayed by an equity, unless manifestly preponderant? I had no difficulty in concurring with the Commissioners, that, as against the estate of the three, there was no provable debt at all, and, against the individuals no proof, until after the

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securities should have been realized and the accounts taken, for the purposes of such individual proof.

It was said, that there was a breach of trust in omitting to take a security, and in continuing the property in the business after the death of *William Hinde*. I cannot accede to that opinion. But, take it to be a breach of trust,—how was it the *joint breach* of trust of the *three*? How is a claim to be raised, by or through the widow and the partner executor, against the three, affecting *three jointly*, or the *joint property of the three*, if any, in respect of this breach of trust? It was, if a breach at all, the *joint breach of trust of the four*, and the *several breaches of trust of the individuals during the life of the widow*. And, after the death of *William Hinde*, in what manner (regard being had to the partnership articles and to the will) could *Hinde's* property have been dealt with, or the interest of the parties have been protected, otherwise than as by operation of law it was protected, and is now protected? Surely, the petitioners ill considered their own position, in asserting that there was a breach of trust by the three, through the effect of which the property of *William Hinde* had been so received by the bankrupts, and had been so converted from its continuing character of capital of the four, as to make it the property of the three, and thus to raise an assumpsit against the three as for money had and received to the use of the testator's estate, or as for a breach by the three, resolvable into damages capable of being liquidated into monies numbered. For, unless I could look at it in that way, what right had I to let in a proof, or a claim protective of dividends against the three? But, supposing I could have seen my way to a proof against the three, still it was a proof in respect of

which the claimants contended that they had a large lien upon the freehold and leasehold property. Now it was quite new to me, that, in favour of a creditor so claiming to be privileged and preferred, I was to stay the dividend of the other uncovered creditors, until such time as the claimant should be enabled first to establish, and afterwards clearly to account for, such his preference in diminution of his proof.

It is true, that, upon an equitable claim, the Court allows a creditor to make it available and to prove for the difference; but this is an indulgence of the Court, not in the ordinary administration of bankruptcy; nor am I aware that the Court has ever gone so far as to admit a proof, or postpone the dividend, until the creditor asserting an equity can perfect his preference over other creditors. If he is in a condition to make his equity available, and to prove for the difference, be it so; he is admitted to do it, and the Court will assist him within reasonable limits to accomplish it. But, if parties have so placed themselves, with a hold upon the property against bankrupts, so as to leave it a question, whether they can retain their hold upon that property against creditors, or without its being previously applied in reduction of their proof, the law must take its course. There is no reason, either in equity or practice, why the general creditors should be delayed. My opinion therefore was (upon a question simply of proof), that there was no case for a proof against the *three jointly*; that, if there was such proof against the three, it was covered by preference, which the claimants must have offered to realize and make available, in reduction of proof, before they were entitled to retain dividends against the general creditors. My principal ground,

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however, upon this part of the case was, that there was in truth no right of proof against the three.

The same observations will not apply with equal conclusiveness to the other part of the prayer (which however was not pressed before me), namely, the proof against the several estates, as to which I have already expressed my opinion, that, *sub modo*, such proof was admissible. In arriving, however, at the conclusion that there was a proof against the individual partners, I could not lose sight of the very important equities, which, beyond the mere question of proof, obviously affected the administration of this property in the bankruptcy, and which called for directions applicable to the property, as a species of property available amongst creditors, as a class of creditors, according to their legal rights of ranking. In this view of it, I am now called upon to make such order, as under these circumstances I should deem right, between parties coming in now under this jurisdiction in bankruptcy, with equities incidental to proof, and affecting assets to be administered by assignees in bankruptcy; and I am prepared to declare my opinion, that, as between these parties and the assignees, as representing all the estates at and from the death of *William Hinde*, his capital is to be dealt with as continued in the uninterrupted business in which he himself had been engaged; that the effect of the bankruptcy upon this continued business was the same as if it had then expired by effluxion of time, the property to be administered as that of the four, until all claims against it had been worked out; and that then (of course, including the lien claimed by the petitioners) it resolved itself into the several estates of the component individuals. There might, or might not, be property of the three; but, as

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far as such property (subject to any question as to mere chattels that might arise out of reputed ownership) was predicated of that which had been the property of the four, it never could have that character; and this was a state of things, which, in regard to the interests of the creditors seeking relief under the bankruptcy, the Court was bound not to lose sight of, viz. how far, as including, or not including, a dormant partner, or as against the property of the four, so involved in the business, or as against the property of the three, if any, they ought to shape their proofs, in order to work out for themselves the most available dividend. The assignees must be restrained from applying any part of the property of the four, otherwise than as was pointed out by the order. The accounts of the partnership must be taken, in order to ascertain what is due to the petitioners from the partnership, and some, or one, of them must be at liberty to prosecute this order. As an element in this account, the last stock-taking of 41,000*l.* is to be taken to their credit, further than as the same may be varied under the provision of the partnership deed for that purpose. The petitioners are entitled to have the subjects of their security realized and applied in reduction of the balance, and to prove for the residue (if any) against the separate estates of the respective bankrupts. And, in the event of the realized securities being more than sufficient to cover what may be due to them, the assignees will be entitled to the surplus, to be proportionably applied as the separate estate of the respective bankrupts. This Order must, of course, be without prejudice to any other lien which may be claimed by any other parties against the bankrupt's estates, and indeed leaves the question of any other lien unaffected.

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So much of this petition, as seeks to prove against the three, must be dismissed, and, save as to that part of it, all parties are to take their costs of this application out of the estate. And the Order may be entered, should the Judge of the Court (in which the causes respectively are) think fit, with the Registrar of the Court of Chancery, there to be dealt with as for the purposes of such suits respectively, as it may be deemed expedient and right.



Westminster,
Nov. 4.

Ex parte LEE.—

A creditor cannot petition for payment of a dividend, unless the dividend was declared subsequent to the proof of his debt.

THIS was the petition of a creditor, praying that the assignees might be ordered to pay him the dividends on his proof. The petitioner had obtained an Order, that he might be at liberty to go in and prove his debt, and be entitled to receive dividends thereon, not disturbing any former dividend, and he had since proved his debt, according to the terms of the Order; but the proof was not made until after a dividend had been declared.

Mr. *Elmsley*, in support of the petition.

Sir JOHN CROSS. There must be an Order of dividend subsequent to the proof, to entitle the creditor to present this petition. He should apply to the assignees to call a meeting of the Commissioners, to declare a dividend on this proof.

Mr. *Elmsley* then requested that the petition might stand over.

Sir JOHN CROSS. I see no reason why the petition should be ordered to stand over. The former Order remains in force, of which the petitioner has still the benefit. He has proved his debt, and all that he wants now is, that a dividend shall be declared upon his proof.

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Ex parte CHRISTOPHER GRAHAM and others—In the matter of EDWIN TURNER and JOHN OGDEN.—

Westminster,
Nov. 4.

THIS was the petition of several creditors, on behalf of themselves and all other the separate creditors of the bankrupt *Turner*, in respect of his separate business as a grocer, praying that they might be permitted to prove against the joint estate of the two bankrupts.

It appeared that *Turner* had, up to July 1840, carried on separately the business of a grocer and tea-dealer at Leeds, when he sold off the stock and retired from that business. In the year 1836 he purchased there an iron-foundry business, in which the other bankrupt *Ogden* was only at first employed as a journeyman; and the petitioners stated, that they were not aware, when their debts were contracted, that *Turner* himself had embarked in that business. The iron-foundry business was afterwards carried on under the firm of *Turner, Ogden & Co.*; but, with the exception of a small sum brought in by *Ogden*, *Turner* found all the money for carrying on the business; *Ogden* being paid journeyman's wages at the rate of thirty shillings a week, and receiving one-fourth share of the profits. The capital of *Turner* in the iron-foundry business amounted to the sum of 8242*l.*, consisting of various sums advanced by him from time to

A. carries on the business of a grocer separately, and also that of an iron-founder in partnership with *B.* After thus trading for four years, he sells off the stock of the grocery business, and retires wholly from that trade, investing the proceeds in the iron-fou: dry business, which, with the exception of a small sum brought in by *B.*, constituted the whole capital of the partnership. A joint fiat is issued against *A.* and *B.* sixteen months after *A.* had retired from his separate grocery trade. Held, that the creditors of *A.* in the grocery trade could not prove against the joint estate of *A.* and *B.*

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time, the principal part of which arose from the assets of the grocery business. When *Turner* retired from the grocery business, the amount of debts he had contracted in that business was about 6000*l.*, for three-fourths of which sum the credit had not then expired; and the petitioners alleged, that, by means of such credit not having expired, they had before the bankruptcy no opportunity of suing for their respective debts, or taking any effective steps to prevent any misapplication by *Turner* of the funds arising from the grocery business. *Turner* alone drew the drafts, and accepted the bills, required for the purposes of the iron foundry business, and also received the monies and managed the accounts of such business; *Ogden* in no way interfering therein.

On the 14th Nov. 1841 a joint fiat issued against *Turner* and *Ogden*, under which various joint creditors of the iron-foundry business had proved their debts to the amount of 7000*l.*, but no dividend had been yet declared.

The petitioners alleged, that *Turner* had a very small separate estate, which was wholly insufficient for the payment and satisfaction of their debts, and that they would be quite remediless, unless they were permitted to prove their debts against the joint estate. When the petitioners applied to make such proof, the Commissioners refused to admit it, except under the direction of the Court of Review.

The prayer was, that the petitioners might be at liberty to prove their debts, and receive dividends thereon, *pari passu*, with the joint creditors of the two bankrupts; and that, until the petitioners should be enabled to make such proof, the declaration of a dividend should be stayed.

Mr. *Anderdon*, and Mr. *Collins*, in support of the petition. The present case does not come strictly within that class of cases where there is separate, but no joint estate. Here *Turner* was alone the monied man, the other partner having no capital. The ground on which this petition is founded is on a principle of equity, that there was but *one fund*, which ought to be administered as it existed before the bankruptcy. The fund liable to the creditors of the grocery trade constituted the fund for carrying on the iron-foundry business. It would be therefore very hard, if the joint creditors of the latter concern were to carry away full payments of twenty shillings in the pound, from a fund which exclusively belonged to one partner, of whom the petitioners were creditors under his previous trading, when a balance of 1400*l.* stood in his banker's hands. The case calls for equitable intervention, for, though in the bankrupt firm there was a community of profits, there was a sole and exclusive ownership of the property, which was originally liable to the debts of the petitioners.

Mr. *Kenyon Parker*, and Mr. *Amphlett*, *contra*, were stopped by the Court.

Sir JOHN CROSS. I can discover no principle of equity in this case to warrant a departure from the general rule. It was not denied, that all the property belonged to the joint estate, as dedicated to the business of the iron-founders. The assignees had a right to possess that fund, and administer it according to the practice in bankruptcy ; this Court having no power to alter the established rule, under which joint creditors

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have a right to look to joint estate, and separate creditors to separate estate.

Mr. *Anderdon* submitted, that, as it was a great hardship upon the petitioners, and the dividend was postponed by the Commissioners to enable the parties to make any application to this Court, the petition ought not to be dismissed with costs.

Sir JOHN CROSS. The Court does not consider that there is any good reason for making this case an exception to the general rule as to costs.

Petition dismissed, with costs.

Ex parte JOHN ARCHER—In the matter of MOSES

NEW.—

Westminster,
Nov. 4.

THIS was the petition of a creditor to prove a debt of 704*l.*, which had been rejected by the Commissioners. It appeared that the petitioner, previous to 1841, held two hotels at Great Malvern, in Worcestershire, the Foley Arms, and the Crown; and that he in that year made an arrangement for transferring the business of the Crown Hotel to the bankrupt, together with the fixtures and furniture, upon condition that the petitioner's son, who was a minor, should become eventually a partner in the concern. The son was only at first to receive 50*l.* a year, and to be afterwards taken into partnership; and all the furniture and effects on the premises were assigned to the bankrupt, who was to be taken in as a partner. The licence is transferred to B. and A.'s son jointly; and B. becomes bankrupt, after contracting a large debt with A.; the proof of which is rejected by the Commissioners, on the ground that A. concealed his son's minority, and thus induced parties to trust the bankrupt, who had no capital. *Held*, that the Commissioners were not justified in rejecting the proof.

signed to the bankrupt; but the licence was transferred jointly to the bankrupt and the son of the petitioner. The valuation of the furniture, which was effected by the petitioner's agent, amounted to 603*l.*, and it was made out to the joint names of the bankrupt and the petitioner's son; but it was sworn that this was by mistake, and that the son's name was afterwards erased.

The objections made to the proof were, that the petitioner by his conduct gave persons who dealt with the bankrupt cause to believe that the petitioner himself was a partner with him, and that he lent himself to a conspiracy to defraud the public, by concealing the fact of his son being a minor. It appeared, however, that disputes had arisen between the son of the petitioner and *New*, previous to the bankruptcy of the latter, and that the son had disclaimed any connection with him as a partner. It also appeared from the correspondence between the petitioner and the bankrupt, that the bankrupt, in one of his letters to the petitioner, asked him what security he wished to have for the debt which the bankrupt owed him.

Mr. *Anderdon*, and Mr. *Greene*, in support of the petition. It cannot be disputed on the other side, that all the furniture and effects of the Crown Hotel were *bonâ fide* sold to the bankrupt, and there is no proof whatever of any fraudulent connivance on the part of the petitioner to deceive the creditors.

Mr. *Bacon*, and Mr. *F. Bayley*, *contrâ*. It is difficult to know what was the real dealing between these parties; but the facts of the case, which are apparent, form a very ingenious mode for defrauding creditors. *New*

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was originally a man of no credit; and he afterwards obtained credit from his supposed partnership with the petitioner, a belief which was strengthened by the petitioner's son joining *New* in the business, and by the transfer of the licence to *New* and the son jointly. If the son was not a partner with *New*, how came the licence to be transferred to the son as well as *New*? For the licence ought to have been only transferred to the person to whom the house was assigned. One of the bankrupt's creditors refused to supply the bankrupt alone with goods, until the petitioner stated that the petitioner's son was a partner. He, therefore, held out that his son was of age, and able to contract. The valuation of the furniture, also, was made out to the joint names of the bankrupt and the son, as the purchasers; and, though it is alleged that the son's name was inserted in the valuation by mistake, it is not stated when the supposed mistake was discovered.

We submit, therefore, that the proof of the petitioner's debt ought, at all events, to be postponed until all the other creditors are paid in full; for he is responsible to them for inducing them to give credit to the bankrupt, and ought not to prove in competition with them. In *Neville v. Wilkinson*(a) an injunction was granted to restrain a party from recovering a demand from one of the plaintiffs, because he had represented to the agent of the other plaintiffs, that there was no such demand existing. And they cited also Mr. Justice *Story's* Treatise on Equity Jurisprudence, Vol. 1, page 165.

Mr. *Anderdon*, in reply, was stopped by the Court.

(a) 1 Brown C. C. 543.

Sir JOHN CROSS. The question in this case is, whether the petitioner has a proveable debt against the estate of the bankrupt. The petitioner states all the particulars of the debt in his petition—that there were goods furnished by him to the bankrupt to the amount of 100*l.*, and another sum for money lent; and there is no dispute whatever, as to the amount or consideration for the debt. The bankrupt also, on the 16th April, writes a letter to the petitioner, in which he thus expresses himself:—"What particular security do you wish to have from me for the debt I owe you?" Now was there ever more distinct evidence of a separate debt owing by any individual, than what this letter acknowledges? Then what is the answer to this claim? Why, that there was a partnership between the bankrupt and the petitioner's son. No doubt that such a partnership was in contemplation; but when disputes arose between the parties, the son repudiated the partnership. And, as to any alleged partnership between the bankrupt and the petitioner, I am of opinion that there was none, nor any ground for supposing that there was any fraudulent endeavour of the petitioner to deceive the persons dealing with the bankrupt. I therefore think that the petitioner is entitled to prove this debt under the fiat; and, as he has been put to the expense of this petition by a mistake of the Commissioners, I think he ought not to suffer from that mistake, but that he should have his costs out of the estate.



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Ex parte PEAT—In the matter of RALEIGH, GOODE,
and HOLLAND.—

Westminster,
Nov. 5.

The costs of annulling a separate fiat, to give effect to a subsequent joint fiat, should come out of the joint estate, if that estate is sufficient to pay them.

THIS was the petition of a creditor, who had sued out a joint fiat against the three bankrupts, to annul three separate fiats which had previously issued against them. The first fiat was issued against *Raleigh* on the 5th August, the second against *Goode* on the 16th August, the third against *Raleigh* and *Goode* on the 17th August, and the joint fiat against the three on the 18th August. The only point raised was, as to which estate should be ordered to pay the costs of annulling one of the separate fiats.

Mr. *Dickinson*, for the petitioning creditor under the separate fiat against *Goode*, applied for an Order, that the costs of annulling that fiat might be paid out of the separate estate of the bankrupt against whom it was issued, on the authority of *Ex parte Brown* (a), where it was held that a joint and separate creditor, who had sued out a separate commission, and had proved under it, might, upon the supersedeas of that commission in favour of a subsequent joint one, have a right to elect out of which estate he would be paid the costs of the supersedeas.

Sir JOHN CROSS. I see no reason in the present case for directing the costs to be paid out of the separate estate, as the joint estate does not appear insufficient to pay the amount of the costs.

(a) 1 Rose, 433.

Mr. *Bacon* appeared in support of the petition.

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Mr. *Anderdon*, and Mr. *Smythe*, for the petitioning creditors under the other two separate fiat.

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Common ORDER.

MEUX v. SMITH.
SEAGER v. SMITH.

Westminster,
Jan. 17, 1843.
Coram Vice-
Chancellor of
England.

THE facts of these cases are stated in the report of the hearing of the motion for an injunction, ante, vol. 1, p. 396.

The case now came on to be heard, and both parties had gone into evidence, but nothing material was added to the facts already stated.

Mr. *Bethell*, and Mr. *Freeling*, for the plaintiffs in the first suit above mentioned.

Mr. *Swanston*, and Mr. *Chandless*, for the plaintiffs in the latter suit.

Mr. *J. Russell*, Mr. *Anderdon*, and Mr. *Shebbeare*, for the defendants.

In addition to the cases cited on the former hearing, *Ex parte Browne* (a), *Ex parte Lees* (b), *Butler v.*

(a) 15 Ves. 472.

(b) 16 Ves. 472.

been made by himself for the above purpose, and agrees to execute a legal mortgage by way of under-lease when required. The publican turns out to have been at the time an uncertificated bankrupt. *Held*, that the brewers had a good lien against his assignees.

Brewers agree to advance money to enable a publican to pay the consideration for the purchase of the lease of a public house, on the understanding that as soon as the lease is executed, it shall be delivered to and deposited with the brewers as a security for the advance. The lease is accordingly made to the publican as lessee, but, on its execution, is delivered by the lessor immediately to the brewer's agent, who advances the money. A memorandum is at the same time signed by the publican, whereby he states the deposit to have

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Hobson (a), *Ex parte Combe* (b), *Hesse v. Stevenson* (c),
Swan v. The Bank of Scotland (d), *Ex parte Rucker* (e),
and *Meux v. Smith* (f), were cited.

Mr. *Bethell*, in reply, was stopped by the Court.

The VICE CHANCELLOR. I really do not require any further argument; because the thing appears to me pretty much in the same light as it did when the matter was brought before me for the purpose of the injunction; and I do not understand, on reading over the Lord Chancellor's language, and which is stated in the printed report, that, with respect to that which constituted the ground of equity, his Lordship entertained a different opinion from me. The only difference of opinion was this, that I perhaps thought the case so clear, that it was not necessary to have the money brought into Court; and the Lord Chancellor thought that it might be open to doubt, and therefore did order the money to be brought into Court; and I believe that was the sole difference between us. But, as to the substance of the case, the point respecting the injunction was one on which he entertained the same opinion as I did; and I must say that I entertain the same opinion now; because you must look at the transaction, as you find it on the whole of the evidence. I am perfectly willing to admit, that, where a matter proceeds on the footing of a memorandum, and that is the transaction between the parties, the Court will not give liberty to persons who may wish to do it, to alter the nature of the evidence, and to depart from

(a) 5 Bing. N. C. 128; 5 Scott, 798. (d) 1 Dea. 746; 2 M. & A. 646.

(b) 17 Ves. 369.

(e) 1 M. & A. 481; 3 Dea. & C. 704.

(c) 3 Bos. & P. 565.

(f) 1 M. D. & D. 396.

the memorandum; but here I am obliged to take the antecedent and the subsequent facts altogether; and it appears to me to be distinctly made out, that the application was first of all made by *Albin* to Messrs. *Meux* at one time, and to Messrs *Seager* at the other, to advance him the sum of 1000*l.* each, for the purpose of enabling him to take the house from Mr. *Gurney*. They both agreed to do it; and whether there was more, or less, of distinct statement or apprehension between them as to the mode in which the security should be given, appears to me to be quite immaterial; because you must look to the subsequent evidence, and see what the parties did. Now the brewers and the distillers could only have from *Albin* that sort of security which he could give, by means of the estate which he was to take from *Gurney*. Whether it was an assignment by *Gurney* to *Albin* of the whole lease which *Gurney* had, or whether it was an underlease from *Gurney* to *Albin*, was perfectly immaterial; that was a matter between *Gurney* and *Albin*; and, in point of fact, they arranged that matter between themselves, that it should be an underlease from *Gurney* to *Albin*. The parties met on the 13th of September, and, there having been the previous promise given by Messrs. *Meux* for themselves, and by Messrs. *Seager* for themselves, that they would advance the sum of 1000*l.* each, and *Gurney* being indebted to them, the whole thing is completely understood. The actual arrangement was, that the advance to *Albin* should be made by the brewers and the distillers respectively writing off from the account to *Gurney*, that is, paying to *Gurney*, each of them, the sum of 1000*l.*; and money paid by the brewers and the distillers to *Gurney* at the request of *Albin*,—or money set off in favour of *Gurney*

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to diminish his debt, at the request of *Albin*,—in point of law, seems to me to constitute an advance to *Albin*, for which *Albin* would be responsible; and so the parties all understood it. The mode in which the transaction was accomplished was this, that on a given day the parties, with a great number of agents, met, and then the exhibit M. is in effect a direction by Mr. *Callow* to his employers to give Mr. *Gurney* 1000*l.* It was all a simultaneous transaction that the two papers M. and N. were delivered to Mr. *Gurney*, and he executed the lease. Now whether he actually, in the execution of the lease, sealed it and delivered it to *Hill*, the clerk of the brewers' solicitors, or sealed it and said, "I seal and deliver this as my deed," and then delivered it to *Hill*, does not appear to me to amount to any substantial difference because it was all one transaction; and it appears to me, that the creation of the legal estate was simultaneous with the creation of the equitable lien of the brewers and the distillers. Now it is observable, that, whatever might be said of these two papers, the brewers and the distillers had actually entered into the contract that they would pay the two sums of 1000*l.* each; and, on the footing of their undertaking to pay these sums to Mr. *Gurney* for Mr. *Albin*, Mr. *Gurney* did actually execute the lease, and caused to depart from himself the legal estate, *pro tanto*, of that thing which he originally held by virtue of the legal lease. The whole was conducted *bonâ fide*; and, these two documents M. and N. having been brought to the different parties, they acted on their promise at once, and discharged *Gurney's* account to the amount of between 1000*l.* and 2000*l.* Now I do not myself think, that the mere terms of the memorandum, which was only given as part of the trans-

action, are to have the effect of defeating the whole of the case; but they are to be taken rather in aid of the case; and, though the thing may be partially misrepresented, the substance of the memorandum tallies with the rest of the evidence; and my opinion therefore is, that these gentlemen have in their different suits established their right to have the equitable lien, which was given by means of the deposit, on the whole concern. I do not think that any thing has been substantially alleged against the ordinary course of the Court in giving the costs. It is really founded principally on a matter of fact, and law arising out of those facts; and the reason alleged why the assignees should not pay the costs is stated in effect to be this, that they have plunged the matter into confusion, by bringing two actions, before they had taken the pains to ascertain what the facts were.

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ACQUIESCENCE.

Where a party, at the time of the

misapplication of a trust fund by the trustee, was cognizant of the fact, but had then no right or interest whatever in the fund, and afterwards acquired such right as administrator to the *cestui que trust*: *Held*, that his rights as administrator were not affected by such previous knowledge on the ground of acquiescence. Where therefore the trustee in such a case became bankrupt, after committing a breach of trust, the administrator of

the *cestui que trust* was not prevented from proving for the amount of the interest on the trust fund, which accrued due in the lifetime of the *cestui que trust*. *Ex parte Smith*, 2 M. D. & D. 113.

ACT OF BANKRUPTCY.

(Absenting.)

Where a debtor, upon application made to him by creditors for payment of their debts, made appointments with them to meet him at specified times and places, with reference to a settlement of their demands, but failed to keep such appointments: *Held*, that the failures to keep the appointments constituted acts of bankruptcy, although the places at which the appointments were made were not his usual places of business. *Russell v. Bell*, 10 Mees. & Wels. 340.

A trader having attended a meeting of his creditors, is desired by them to withdraw, until they can come to some resolution on the state of his affairs, he accordingly retires to an outer room, where he is served with a copy of a writ, upon which he abruptly takes his hat and leaves the place of meeting altogether, not returning till the expiration of an hour, when the meeting had broken up. *Held*, that his thus absenting himself amounted to an act of bankruptcy. *Ex parte Dean*, 2 M. D. & D. 127.

Departure from home, with intent to delay creditors, is an act of bankruptcy, although there has been no delay of any creditor. *Rouch v.*

Great Western Railway Company, 1 P. & D. 686.

A letter therefore written by a trader during his absence from home, stating that he was absent to avoid writs that were out against him, is admissible evidence of an act of bankruptcy, without proof *aliunde* that any such writs were out, or that he was under any pressure from creditors. *Ibid*.

(Execution.)

A person suffering judgment by default does not "procure" his goods to be taken under sect. 3 of 6 Geo. 4. c. 16., so as to be an act of bankruptcy, although his goods be afterwards taken in execution sued out upon that judgment. *Gibson v. King*, 1 Carr. & Mar. 458.

A person's "procuring" his goods to be taken in execution has no effect as an act of bankruptcy till the goods are actually taken. *Ibid*.

(Fraudulent Conveyance.)

A conveyance by a trader of all his effects in a given place is not an act of bankruptcy, unless it be shown that he has no other property. *Chase v. Goble*, 3 Scott N. R. 245; 2 Man. & Gr. 92, S. C.

See Escrow.

(Under 1 & 2 Vict. c. 110, s. 8.)

Where the petitioning creditor proceeded under the 1 & 2 Vict. c. 110, s. 8, and for the period of a fortnight of the twenty-one days limited by the statute for the payment of the debt.

kept out of the way to avoid receiving it, and during his absence, the debtor made a tender of the whole debt to the managing clerk of the petitioning creditor: *Held*, that he concerted the act of bankruptcy, and that he could not support a fiat against his debtor for non-payment of the money within the twenty-one days. *Ex parte Gratton*, 2 M. D. & D. 401.

When a public company proceed under the act, it must be proved that some person was duly authorized by them to demand the payment of the debt. *Ibid*.

Semble, also, that where the proceedings are taken under the statute by the petitioning creditor, not for the purpose of obtaining the payment of his own debt, but to compel the bankrupt to satisfy the alleged debt of a third person, the fiat cannot be supported. *Ibid*.

Quære, whether in the computation of the twenty-one days mentioned in the 1 & 2 Vict. c. 110. s. 8. the day on which the notice is served is to be included. *Gibson v. Muskett*, 3 Scott N.C. 429; 4 Man. & Gr. 160, S.C.

A commissioner who has approved of the security offered by a debtor, under 1 & 2 Vict. c. 110. s. 8. is *functus officio*, and cannot revoke his approval. *Quære*, if he may impose upon the debtor the terms of giving the creditor two days' notice before offering security. *Ex parte Neale*, 2 M. D. & D. 620.

(*Pleading.*)

If in an action of trover by the

assignees of a bankrupt, the defendant plead that the plaintiffs are not assignees, the plaintiffs may upon that issue give evidence of any act of bankruptcy committed before the date of the fiat, although such act of bankruptcy be later in date than the transaction which is relied on as the conversion by the defendant. *Gibson v. King*, 1 Car. & Mar. 458.

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Quære, whether the court will, on the application of the bankrupt, make an order to stay the advertisement, where the bankrupt has presented no

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ANNUITY.

A. and B., for a valuable consideration paid to them, join with *C.* as their surety in granting an annuity to *D.*; and the three jointly and two of them separately covenant that the three, or some or one of them, shall well and truly pay the annuity. A warrant of attorney of even date with the indenture was also given by the three as a collateral security, and it was thereby declared that the judgment to be entered up on the warrant of attorney should be considered as a further security to *D.*: *A. and B.* afterwards became bankrupts.

Held, 1st. that *D.* might prove against the estate of *A. and B.*, for the value of the annuity.

2nd. That the covenant to pay the annuity was not merged in the judgment. *Ex parte Pennell*, 2 M. D. & D. [273](#).

On a petition that the property on which an annuity is charged should

be sold for the payment of the value of the annuity, the court will refer it to the commissioner to ascertain in the first instance, whether the petitioner has a valid security on the premises, on which the annuity is alleged to be charged. *Ex parte Stuart*, 2 M. D. & D. [540](#).

A bankrupt, previous to his marriage, became bound to trustees in the penal sum of £3000, conditioned for payment to them by his executors of an annuity of £150, in case his intended wife should survive him, in trust for her use and benefit. The bankrupt and his wife were both living. *Held*, that the trustees could prove for the value of the annuity, under the provisions of the 54th section of the 6 Geo. 4, c. 16, although it was not an annuity in possession. *Ex parte Broadley*, 2 M. D. & D. [524](#).

ANNULING FIAT.

(*Where issued with improper object.*)

Where the act of bankruptcy was concerted between the solicitor, the petitioning creditor, and the bankrupt, for the sole purpose of defeating an execution creditor, and the solicitor was the prime mover of the plot, the fiat was annulled with costs as against the solicitor, the bankrupt, and the petitioning creditor. *Ex parte Barnett*, 2 M. D. & D. [325](#).

Although a fiat may be concerted between the bankrupt and the petitioning creditor, and may be lawfully issued to defeat an execution, still if

the main object is to serve the purposes of the bankrupt and the petitioning creditor, and not for the benefit of the general creditors, it will be annulled. *Ex parte Spicer*, 2 M. D. & D. [388](#).

(*For want of good Petitioning Creditor's Debt.*)

Where the petitioning creditor's debt was found to be invalid, and no debt of sufficient amount to support the fiat, and incurred not anterior to the alleged petitioning creditor's debt had been proved so as to be substituted on the proceedings, the fiat was annulled on the petition of the assignees, and without any prayer to issue a new fiat, the bankrupt not being indebted to them either separately or jointly in a sufficient amount to support a fiat. *Ex parte Hawkins*, 2 M. D. & D. [320](#).

See PETITIONING CREDITOR'S DEBT.

(*For Misnomer in Fiat.*)

See MISNOMER.

(*Separate Fiat.*)

A separate commission issued against *A.* and a joint commission against *A. B.* and *C.*, but inasmuch as there was some difficulty in the proof of the act of bankruptcy upon which the joint commission was founded, the Court refused to supersede the former commission, but ordered it to be suspended with liberty to the parties to apply. *In re Beale*, 2 Dr. & W. [566](#).

A separate fiat was annulled in favour of a subsequent joint one, notwithstanding the separate estate was more important than the joint estate, and one of the bankrupts intended to dispute his bankruptcy. *Ex parte Burdikin*, 2 M. D. & D. [187](#).

(*Trust deed.*)

When a fiat will be annulled to give effect to a trust deed. *Ex parte Yates*, 2 M. D. & D. [123](#).

(*Fiat against Infants.*)

See INFANT.

(*At whose instance and under what circumstances.*)

A trader, against whom a fiat is issued, canvasses for particular individuals in the choice of assignees; he also negotiates on behalf of a relative for the purchase of a part of the estate from the assignees. *Held*, that these were sufficient acts of acquiescence in the fiat, to prevent his succeeding on a petition to annul, although the assignees do not satisfactorily establish the commission of an act of bankruptcy. *Ex parte Grundy*, 2 M. D. & D. [589](#).

Where a creditor petitioned to annul a fiat eight months after it had been issued, on the ground that the bankrupt was not a trader, and a final dividend had been made, and the bankrupt had obtained his certificate, and no cause was assigned for the delay, the petition was dismissed

with costs. *Ex parte Hill*, 2 M. D. & D. [557](#).

The Court will not entertain a petition of a relative of the bankrupt to annul the fiat on the alleged ground that his remaining abroad was without any intention to delay his creditors when the petition is presented without the bankrupt's privity, and he himself makes no affidavit on the subject. *Ex parte Rhodes*, 2 M. D. & D. [41](#).

Where the bankrupt, after the death of the petitioning creditor, presented a petition to annul the fiat, disputing both the trading and the debt; and it appeared that his statement as to the trading conflicted with his deposition on this subject before the Commissioners, the Court refused to annul, more than two years having elapsed since the issuing of the fiat. *Ex parte Ford*, 2 M. D. & D. [111](#).

Quære, whether the Court of Review has concurrent jurisdiction with Lord Chancellor to annul fiats. *Atkinson v. Raleigh*, 2 Gale & Dav. [611](#).

(Costs of Annuling.)

See COSTS.

APPROPRIATION OF PAYMENTS.

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Submission to, not revoked by bankruptcy.

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ASSIGNEES.

(Acquiescence of.)

See SECOND FIAT.

(Adoption of contract by.)

Assumpsit by the assignees of *T. H.*, a bankrupt. The declaration stated that *T. H.*, before he became bankrupt, at the request of the defendant, bargained for and agreed to buy from the defendant 2000 quarters skreened Odessa linseed, at the rate of [30s. 10d.](#) a quarter, free on board at Odessa, the shipment to be made on board the buyer's vessel on arrival at Odessa; which vessel was to be forthwith chartered for thence, and the amount of invoice was to be paid on handing over the same and the bill of lading to the buyers in London, in ready money, less $2\frac{1}{2}$ per cent. discount. The declaration then averred that *T. H.* did, after making of the promise, and before the bankruptcy, forthwith dispatch a vessel to Odessa, chartered by him, which vessel arrived at Odessa within a reasonable time; that the vessel arrived at Odessa after the bankruptcy of *T. H.*, and within a reasonable time after such arrival was ready and willing to receive the linseed on board, and that one *R. H.*, the master of the vessel, was ready and willing to deliver to the defendant bills of lading for the linseed, of which the defendant had notice, and was requested by the said *R. H.*, the agent of the plaintiffs in that behalf, to deliver the linseed on board the

vessel; that the defendant refused to deliver the linseed on board the vessel, or any part thereof, by reason whereof the plaintiffs, as assignees of *T. H.*, had sustained damage. The declaration then went on to allege, that although the defendant had notice of the bankruptcy, and that the plaintiffs being duly appointed his assignees, were, within a reasonable time, ready and willing and then tendered and offered to pay for the linseed, and then requested the defendant to hand over to them bills of lading for the linseed in London, yet the defendant wholly refused to do so.

Plea, that the plaintiffs did not, within a reasonable time after the bankruptcy of *T. H.*, and the arrival of the vessel at Odessa, give notice to the defendant of their intention to adopt the contract for the purchase of the linseed, and to abide by the terms thereof.

Held, on special demurrer,

1. That the declaration disclosed a good ground of action, and that the plaintiffs were entitled to recover.

2. That the matter contained in the plea formed no answer to the action. *Gibson v. Carruthers*, 8 Mees. & Wels. 321.

(*Advance to Bankrupt.*)

To defend prosecution for felony must be by consent of all the assignees. *Ex parte Scholefield*, 2 M. D. & D. 644.

(*Choice.*)

Where the Commissioners, at the election of assignees, rejected votes which would have turned the choice, on the ground that the creditors tendering them had an adverse interest to the general body of creditors, the Court set aside the choice which had been ratified by the Commissioners, and, without directing a new one, declared the assignees elected by the majority duly chosen. *Ex parte Stallard*, 2 M. D. & D. 469.

(*Costs.*)

Assignees pay costs of issue unsuccessfully contested by them under Interpleader Act. *Mcville v. Smark*, 3 Scott, N. C. 357.

(*Election by.*)

A parol lease is within 6 Geo. 4. c. 16, s. 75.

Quære, whether, upon a petition under this section, the Court has jurisdiction to give the landlord his costs. *Ex parte Hopton*, 2 M. D. & D. 347.

(*Injunction.*)

Assignees restrained, at suit of defendant, a creditor, from prosecuting an action to which there is a good legal defence. *Ex parte Pearce*, 2 M. D. & D. 142.

(*Laches.*)

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(*Marshalling on behalf of.*)

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(*Official.*)

See OFFICIAL ASSIGNEE.

(*As to Property of Bankrupt's Wife.*)

See MARRIED WOMAN.

(*As to property and rights of action passing or not passing to assignees.*)

Goodwill passes to assignees, so far as it is local. *Ex parte Thomas*, 2 M. D. & D. 294.

A customer deposits with a banker two bills for 1000*l.*, indorsed by him, for the amount of which it was agreed he should draw, the bankers refusing to discount them. The customer only draws for 65*l.*, and the bankers employ a broker to discount the bills, and became bankrupt in less than three weeks after they were originally deposited with them by the customer. *Held*, that the customer was entitled to the proceeds of the bills. *Ex parte Edwards*, 2 M. D. & D. 625.

Dividend warrants, on which the bankrupts, in their character of stock brokers, were entrusted to receive the dividends, and which they had pledged for their own debt, were ordered to be delivered up to trustees who had employed the bankrupts as their broker. *Ex parte Gregory*, 2 M. D. & D. 613.

Trespass for breaking and entering the dwelling house and garden of

the plaintiff, and making a great noise and disturbance therein, &c. &c. whereby the plaintiff and his family were greatly harassed, disturbed, and annoyed in the peaceable possession of the dwelling-house. Plea, that after the trespass, and after the commencement of the suit, the plaintiff had become bankrupt, and one *W. P.* was appointed assignee, whereby and by virtue of the statutes, &c. the said cause of action vested in the said *W. P.* *Held*, on general demurrer, that the plea was bad. *Spence v. Rogers*, 11 Mees. & Wels. 191.

Quære, whether it would have been good if it had been shown that the locus in quo passed to the assignees. *Ibid.*

A. agreed, in writing, with *B.* and *C.*, on behalf of themselves and *D.*, as partners in the business of type-founders, faithfully to serve them, and the survivor of them, for seven years, as their foreman, and not to engage in trade on his own account for that period without their consent; and *B.* and *C.* agreed to pay him wages after the rate of 3*l.* 3*s.* weekly as long as he should serve them faithfully. *Held*, that the right of action for a breach of this agreement, by dismissal of *A.* from their service without reasonable cause, did not pass to the assignees of *A.* on his bankruptcy, the contract relating to the employment of the personal skill and labour of the bankrupt, and the damages for the breach of it being composed partly of the personal in-

convenience to himself, and partly of the consequential loss to his personal estate. *Beckham v. Drake*, 8 Mees. & Wels. 846.

A. agreed in writing with *B.* and *C.*, on behalf of themselves and *D.*, as partners in trade, to serve them, *B.* and *C.*, and the survivor of them, for seven years, as their foreman, and not to engage in trade on his own account, during that period, without their consent; and *B.* and *C.* agreed to pay him wages after the rate of 3*l.* 3*s.* per week, so long as he should serve them faithfully. Held, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that the right of action for a breach of the agreement, by the dismissal of *A.* from the service, without reasonable cause, passed to the assignees of *A.* on his bankruptcy, as being part of his personal estate whereof a profit might be made. *Drake v. Beckham*, 11 Mees. & Wels. 315.

The right of action for the seduction of a servant does not pass to the master's assignees on his bankruptcy. *Howard v. Crowther*, 8 Mee. & W. 601.

And see LIMITATION OVER—MORTGAGE.

(Purchases by, of bankrupt's property.)

In January, 1820, *A.* and *B.*, who held more than one-third of the shares in a Cornish mine, which was then a losing concern, and the shares were of very little if of any value, became

bankrupt. At a meeting of the other shareholders, held in February, at which *G.*, though not then a shareholder, was present, it was resolved, in order to prevent the mines from being abandoned, and the injury which the neighbourhood would sustain thereby, that a new company should be formed, consisting of old shareholders, and of persons who might be inclined to purchase shares in the mines, and that for the security of the latter, the mines should be sold under a decree of the Court of Stannaries, and the debts of the mines paid with the proceeds. Shortly afterwards *G.* was appointed assignee of the bankrupts, and then, in order to avoid the responsibility of continuing to hold their shares, he relinquished them under counsel's advice. Afterwards the shares were disposed of amongst old and new adventurers, and *G.*, who had proposed to the trustees for the defendant, then a minor, to take some of the shares, agreed to take eleven for himself and friends, and at the same time the trustees authorized him to take four shares for the defendant. The mine was afterwards sold in the Court of Stannaries to *G.*, on behalf of the new company. The purchase money was paid into Court, and then applied to pay the debts of the mine. Soon afterwards the defendant came of age, and his agents paid *G.* for the four shares, at the rate at which he had purchased the eleven, and the four shares were transferred into the

defendant's name. The mine continued to be a losing concern to the new company until after they had prevailed on the defendant, who was the owner of the freehold, to accept a surrender of the lease under which it had been held, and to grant a new lease at reduced dues, and including new mining ground. Afterwards *G.* was removed from the assigneeship, and a renewed commission was issued, under which the plaintiff was chosen assignee of the bankrupts.

Notwithstanding the term granted by the old lease had long expired, and the defendants had no knowledge of the bankruptcy, and fifteen years had elapsed, during which there had been a large expenditure on the mines, the Court declared the defendant to be a trustee of his shares in the mine, including the new ground, and decreed him to account for and pay the plaintiff the profits thereof. *Turner v. Trclawny*, 12 Sim. 42.

(Suits pending at Bankruptcy.)

See BANKRUPTCY.

(Removal of.)

On a petition by the bankrupt for the removal of one of two assignees, where it appeared that he was a mere instrument in the hands of the other assignee, and that the petition was got up between them in collusion, and out of a spirit of hostile opposition to the assignee, against whom it was presented, the petition

was dismissed. *Semble*, that a bankrupt may petition for the removal of an assignee, although his estate may not be expected to produce a surplus. *Ex parte Oakes*, 2 M. D. & D. 60.

Semble, that a creditor, who has not proved before the Commissioners, may petition for the removal of an assignee, but if he do not himself, in support of his petition, make an affidavit of his debt, the petition will be dismissed with costs. *Ex parte Barnett*, 2 M. D. & D. 692.

Where an assignee has sold his debt to a creditor, who was adverse to the fiat, he was ordered to be removed, and a new one chosen in his room, and he was restrained from voting in the choice of the new assignee. *Ex parte Stagg*, 2 M. D. & D. 186.

Where the amount of a creditor's debt, which would have turned the choice of assignees, was not disputed on his application to prove it before the Commissioners, but the proof was opposed by the solicitor who issued the fiat, on an invalid objection, which induced the Commissioners to reject the proof, and they refused to adjourn the choice for a reasonable time to enable the creditor to produce an unnecessary document, the production of which was insisted upon by the Commissioners, and the whole proceedings appeared to be a stratagem of the solicitor to hurry on the choice of assignees, and to prevent the creditor from voting

in such choice, a new choice was directed. *Ex parte Spiller*, 2 M. D. & D. 43.

(*Title to Property sold by.*)

Assignees of a bankrupt agreed to sell a part of his estate, and filed a bill for specific performance. It turned out that the estate was vested in assignees under a previous insolvency. After the Master had made his report upon a reference as to title, the assignees in insolvency offered to concur in the sale. *Held*, that a good title could be made. *Sidebotham v. Barrington*, 4 Beav. 110.

ATTORNEY.

(*Power of.*)

Assumpsit by husband and wife for money lent to the defendant by the wife while she was sole and unmarried. Plea, that B. the husband became bankrupt, and that his assignees were duly appointed, and accepted the appointment, before the commencement of the suit; by reason whereof the assignees became entitled to the supposed debts and causes of action in the declaration mentioned. Replication, that before the intermarriage of the plaintiffs, and whilst C. the wife was sole and unmarried, to wit, on, &c. by an indenture then made between the said B. of the 1st part, the said C. of the 2nd part, and T. H. and R. T. J. of the third part (being a settlement entered into before the intermarriage of the plaintiffs), the sums of money

in the declaration mentioned were assigned to the said R. H. and R. T. J. to have, receive, and recover, and to hold the same upon certain trusts in the indenture mentioned, in favour of the said C., and for her sole and separate use during her life, and for the child and children of the intended marriage. The replication then stated, that the plaintiffs appointed T. H. and R. T. J. as their attorneys to recover the said sum for the defendant, for the purpose of holding the same upon the trusts aforesaid; and the action was commenced and prosecuted in the names of the plaintiffs, at the instance and by the direction of the said T. H. and R. T. J. by virtue of the power given to them, and for the purpose of recovering, receiving, and holding the said sums of money as the trustees mentioned in the said indenture, and upon the trusts in favour of the said C., and of the children of the said marriage, and not for the use or benefit of the plaintiff B., or of his creditors under the fiat. *Held*, on demurrer, that the replication was good, and that the debt did not pass to the assignees under the bankruptcy of the husband, but must be sued for by the husband and wife. *Parnham v. Hurst*, 8 Mees. & Wels. 743.

(*Warrant of.*)

See WARRANT OF ATTORNEY.

BANKER.

See ASSIGNEES.

BANKING COMPANY.

In an action against the public officer of a banking copartnership, the Court set aside the plea of the defendant's bankruptcy, on the plaintiff's undertaking not to sue out execution personally against the defendant, his lands or goods. *Steward v. Dunn*, 11 Mees. & Wels. 63; 2 Dowl. Pr. Ca. N. S. 742, S. C.

May prove against one of its members. *Re Caldecott*, 2 M. D. & D. 368.

The bankrupt was a member of a joint stock banking company, and kept an account with the bank as a customer; at the time of his bankruptcy he was indebted to the bank to a considerable balance beyond the value of his shares in the bank, and some other property on which the company had a lien. *Held*, that this balance constituted a proveable debt. *Ex parte Wallis*, 2 M. D. & D. 201.

(*Reputed ownership of Shares in, held on trust.*)
See TRUST.

BANKRUPT.

A trader, against whom a fiat is issued, canvasses for particular individuals in the choice of assignees; he also negotiates on behalf of a relative for the purchase of a part of the estate from the assignees. *Held*, that these were sufficient acts of acquiescence in the fiat to prevent his succeeding on a petition to annul, although the assignees do not satis-

factorily establish the commission of an act of bankruptcy. *Ex parte Grundy*, 2 M. D. & D. 589.

See ANNULING.

A bankrupt, who was abroad when the commission was issued, after the lapse of many years returned to England and obtained an order for leave to surrender and pass his last examination; he accordingly went down from London to Liverpool to attend the Commissioners for this purpose; but not one expressed any wish or intention to examine him; and the Commissioners, after taking his surrender, adjourned the last examination for three months, but not at the request of the bankrupt. *Held*, that the bankrupt's non-attendance at the adjourned meeting did not deprive him of his right to an order on the assignees under the 123d section of 6 Geo. 4, c. 16, to declare how they had disposed of his real and personal estate. *Ex parte Tarleton*, 2 M. D. & D. 189.

Where it appeared that a bankrupt was by reason of lunacy (though not found by inquisition) incompetent to make the usual affidavit that his certificate and the consent of the creditors to his discharge had been obtained without fraud, his own affidavit was dispensed with; but in such a case an affidavit to the above effect must be made by some one else. *Ex parte May*, 2 M. D. & D. 381.

The Court will decline making any order on the assignees for the pay-

ment of the bankrupt's allowance until the amount is ascertained by the Commissioners. *Ex parte Heron*, 2 M. D. & D. 648.

In an action by the assignees for a debt due to the estate, *Held*, that the bankrupt was a competent witness, and might prove by parol that he had released the surplus of the estate without producing or otherwise proving any deed of release. *Lucas v. Eades*, 2 Dowl. P.C. N.S. 424.

A defendant, who has become bankrupt and obtained his certificate after trial and verdict against him, has a right to set it aside for want of a sufficient notice of trial, although his estate is insolvent, and his assignees are no parties to the application. *Shepherd v. Thompson*, 9 Mees. & Wels. 110.

The bankrupt being indicted for a conspiracy to obtain goods by false pretences, swore that he was innocent of the charge, and that if he was convicted the estate would be greatly damaged, as the prosecutor would be enabled to prove for a large sum under the fiat; he therefore applied for an order, that his assignees might advance him 1000*l.* to defend himself against the indictment; to which application one of the assignees objected, and the two others merely expressed their willingness to submit to any order of the Court. *Held*, that such an order could not be made without the consent of all the assignees. *Ex parte Scholefield*, 2 M. D. & D. 644.

It is no objection to the allowance of the bankrupt's certificate, that he has received money since his bankruptcy as a surveyor, for valuing tithes, which he has not accounted for to his assignees, such money being considered as the fruits of his personal labour. *Ex parte Walters*, 2 M. D. & D. 635.

BANKRUPTCY.

(Act of.)

See ACT OF BANKRUPTCY.

(Actions and Suits pending at the Time of.)

One of two coplaintiffs having become bankrupt, and the other appearing, on the motion of the defendant to dismiss for want of prosecution, and declining to proceed with the cause, the bill was dismissed with costs. *Kilminster v. Pratt*, 1 Hare, 632.

Upon the bankruptcy of a defendant in a copartnership suit, the Court declined to make an order that a supplemental bill should be filed within a given time against the assignees, or the bill stand dismissed. *Manson v. Burton*, 1 Y. & C. N. C. 626.

Where a verdict is taken for the plaintiff, subject to a special case, and before the case is settled the defendant becomes bankrupt, the Court will not order that a verdict be entered for the defendant, unless the plaintiff proceed with the case; but they will set aside the nominal verdict, and

direct a new trial, unless both parties consent to a *stet processus*.—*Cottam v. Partridge*, 2 Man. & Gr. 843; 3 Scott, N. R. 174, S. C.

(*Arbitration, how affected by.*)

In a submission to arbitration by order in Nisi Prius in an action between A. and B., it is stipulated that a certain sum of money shall be placed by B. in the hands of C., the arbitrator, to abide the event of the award. B., after placing the sum in the hands of C., becomes bankrupt. The submission is not revoked, nor are the assignees of B. entitled to demand back the money. *Taylor v. Marling*, 2 Man. & Gr. 55; 2 Scott, N. R. 374, S. C.

(*Contemplation of.*)

See FRAUDULENT PREFERENCE.

(*Stipulations in extent of.*)

A contract by a trader to do certain works, contained a clause that if he should become bankrupt or delay proceeding with the works, his employer should have power, after a seven days' notice to him, to procure others to do the works; that the advances made to the trader before his default should be taken as full payment; and that all tools and materials being upon the works should become the property of the employer.

The trader having delayed to proceed with the works, was served on the 10th April by the employer with notice to proceed. On the 17th April

the trader committed an act of bankruptcy. In trover by his assignees against the employer for tools and materials left upon the works, *Held*, that they did not become the property of his employer at the end of the seven days' notice, because they had vested in his assignees, by relation, on 12th April, before the notice had expired. *Rouch v. Great Western Railway Company*, 4 P. & D. 686.

See LIMITATION OVER IN CASE OF
BANKRUPTCY.

(*Trustee.*)

By becoming bankrupt he becomes "unfit" to act in the trusts. *In re Roche*, 1 C. & Law. 306; 1 Dr. & War. 287, S. C.

BILL OF EXCHANGE.

Where a party accepted a bill in the bankrupt's name, without his authority, an acknowledgment by the bankrupt to the holder of the bill, after it became due, that he was responsible for the payment of the bill, was held not to constitute a good petitioning creditor's debt, so as to enable the holder to sustain a fiat against the bankrupt. *Ex parte Edwards*, 2 M. D. & D. 241.

A bankrupt having accepted a bill for 200*l.* which had been negotiated by the drawer, and finding shortly before it fell due that he should be unable to pay it, persuaded the drawer to draw another bill on him for 220*l.* and to get it discounted in order that he might take up the first-mentioned bill. The drawer discounts the bill

for [2204](#), with the petitioner, but instead of applying the proceeds to pay off the first bill, appropriates them to his own use, and the holder of the first bill proves the amount of it under the fiat. *Held*, that the petitioner, who had no knowledge of the circumstances under which the second bill was given, or of the breach of trust committed by the drawer, was not prevented from proving the amount of such second bill. *Ex parte Samuel*, 2 M. D. & D. [384](#).

See ASSIGNEES, PROPERTY PASSING TO—CERTIFICATE—LIEN—PETITIONING CREDITOR'S DEBT—SET-OFF.

CERTIFICATE.

(*Signature to.*)

Certificate in country commission allowed, though signed by only two Commissioners. *Ex parte Gardner*, 2 M. D. & D. [533](#).

(*Conformity.*)

Affidavit of, by bankrupt, dispensed with where he was a lunatic. *Ex parte May*, 2 M. D. & D. [381](#).

Certificate allowed where the bankrupt was abroad, on the production of an affidavit of a third party that the signatures of the creditors were properly obtained. *Ex parte Waterhouse*, 2 M. D. & D. [760](#); overruled, see *In the matter of Carruthers*, 3 M. D. & D.

(*Petition to stay.*)

Should not be presented until certificate is signed by the Commission-

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ers, and taken into the office for allowance. *Ex parte Cross*, 2 M. D. & D. [308](#).

Cannot be presented by creditor who has not proved. *Ex parte Mex-ton*, 2 M. D. & D. [442](#).

In a petition to be admitted to prove, and to have the certificate stayed on the ground of the Commissioners having improperly declined to admit the proof, it is not necessary to allege that the petitioner's debt would turn the certificate. *Ex parte Whitworth*, 2 M. D. & D. [164](#).

Where all the creditors except the petitioners had signed the bankrupt's certificate, and they, on the day before it would have been allowed in due course of law, presented a petition to stay it, on the ground that the amount of their debt, after deducting the value of the securities held by them, would turn the certificate, and that they had been involved in litigation and expense in establishing the validity of their securities; but it did not appear that the bankrupt was a party to such litigation, or occasioned any delay to the petitioners, the Court refused to stay the certificate. *Ex parte Whitworth*, 2 M. D. & D. [133](#).

Not delayed because bankrupt has not accounted for money received by him for valuing tithes since his bankruptcy. *Ex parte Walters*, 2 M. D. & D. [635](#).

(*Improperly obtained.*)

Where money is given to a cre-

ditor to induce him to sign a bankrupt's certificate, the certificate so obtained is void. *Sievers v. Boswell*, 4 Scott, N. R. 165.

To an action for money had and received, brought by a bankrupt to recover back money so paid by him, the defendant pleaded that the money had been demanded by and paid to the assignees before the commencement of the action. *Held*, a sufficient answer. *Ibid*.

(What Debts barred by.)

On *B.* being in custody on a *ca. sa.* at the suit of the plaintiffs, they agreed to discharge him upon his executing a warrant of attorney to secure the payment of the debt (275*l.* 12*s.*) by instalments, and upon the defendant's signing the following undertaking: "*Lane and others v. Bacon*.—In consideration of your discharging the defendant out of custody in this action, I undertake that he shall pay the debt to you, viz. 275*l.* 12*s.*, together with interest, by four equal half-yearly instalments, the first instalment to commence on the 17th May 1839. The warrant of attorney was executed (to the knowledge of the defendant), the undertaking signed on the 17th November 1838, and *B.* discharged from custody. A fiat issued against the defendant on the 26th April 1839, under which he was duly declared a bankrupt, and obtained his certificate on the 6th August following, *Held*, that the certificate was no bar to an action against the bankrupt for the

third instalment due on the 17th May 1840, for that inasmuch as *B.* continued liable as the plaintiff's debtor by virtue of the warrant of attorney executed by him before his discharge, and the defendant's undertaking was given with reference to *B.*'s liability, and as a collateral guarantee for the payment of the instalment secured by the warrant of attorney; and as no instalment became due before the fiat, there was no debt due from the bankrupt at the date of the fiat that could have been proved under it. *Lane v. Burghart*, 4 Scott, N. R. 287.

The plaintiff accepted two bills drawn upon him by the defendant for value; before they arrived at maturity, the plaintiff being unable to meet them, it was agreed that he should accept other two bills in lieu of them, in consideration of which the defendant undertook to provide for the first two, which he had negotiated; the defendant however failed to perform his engagement, and the plaintiff was ultimately compelled to pay all the bills. The two first-mentioned bills became due before, but were not taken up by the plaintiff till after, the issuing of a fiat against the defendant. In an action against the defendant for a breach of the indemnity, *held*, that the bills constitute a debt of the bankrupt, for which the plaintiff was liable at the time the fiat issued, within the meaning of the 52d section of the 6 Geo. 4. c. 16., and consequently that the certificate was

a bar. *Filbey v. Lawford*, 4 Scott, N. R. [208](#), [611](#).

And see PROOF.

(*No Release of Rent, when.*)

See LANDLORD AND TENANT.

CHANCERY.

Plaintiffs in equity claiming to be admitted as creditors under a fiat in bankruptcy in respect of a breach of trust by the bankrupts, which was the subject of the suit in equity, applied, on a dividend of the bankrupt's estate being about to be declared, to be allowed to enter a claim upon the proceedings, and to have a fund reserved: the application being refused by the Commissioners, was renewed by petition to the Court of Review, and also refused by that Court. A supplemental bill was then filed, praying an injunction to restrain the assignees from paying any dividend which might be declared, until the cause in equity was heard, or without reserving a sufficient fund to answer the plaintiff's demand. *Held*, that if the Court of Chancery had jurisdiction to interfere in the distribution of the estate of a bankrupt, the Court ought upon general principles, after an adjudication in bankruptcy on the subject of the distribution, to refrain from exercising any such jurisdiction; but *semble*, the Court has no jurisdiction to interfere in the mere distribution of the estate of a bankrupt, either on the ground of trust or

otherwise. *Thompson v. Derham*, 1 Hare, [358](#).

CLERK.

See SERVANT.

COMMISSIONERS.

The Commissioners have no jurisdiction to expunge a proof which has been placed on the proceedings in pursuance of an Order of the Court of Review. *Ex parte Whitworth*, 2 M. D. & D. [164](#).

Where a Commissioner refused to adjudicate the bankruptcy, because he was not satisfied with the evidence of the trading, which appeared to the Court to be sufficient, it was recommended that the matter should be submitted to the decision of a Sub-Division Court. *Ex parte Brown*, 2 M. D. & D. [753](#).

The defendants, who were Commissioners of Bankrupts at Leeds, issued their summons to the plaintiff, by which they commanded him to appear at a meeting before them, at eleven o'clock on a certain day, and to bring with them a certain deed of assignment. He appeared accordingly at eleven o'clock, and afterwards at one. Upon his attending on the second occasion, he saw one of the Commissioners, who, on learning that he had not brought the assignment, said, "You must have known it was of no use to come without the assignment; but we will hear what you have to say by and bye."

The plaintiff then went away, and two days afterwards was taken into custody by warrant of the Commissioners, which, after reciting the proceedings in bankruptcy, and the issuing and service of the summons, "and that the plaintiff did not come before them in pursuance of the summons in order to be examined touching the matter aforesaid, and to produce the said assignment, he having no lawful impediment," directed the constable to apprehend the plaintiff, and bring him before the Commissioners to be examined as aforesaid, "and to produce the said assignment." *Held*, first, that the issuing of the warrant was regular, the plaintiff being bound not only to attend at the appointed hour, but to wait till he could be examined; secondly, that the warrant was not vitiated by the introduction of the words "to produce the said assignment," inasmuch as a party is compelled to do so if commanded, under 6 Geo. 4. c. 16. s. 34. *Wright v. Maude*, 10 Mees. & Wels. 527.

Commissioners not ordered to pay costs, when. *Ex parte Davidson*, 2 M. D. & D. 375.

(*What sufficient obedience to Warrant of.*)

See WARRANT.

(*Jurisdiction of Commissioners under 1 & 2 Vict. c. 110. s. 8.*)

See ACT OF BANKRUPTCY.

(*Different Fiats, when directed to same Commissioners.*)

See FIAT.

COMPANY.

See BANKING COMPANY—MORTGAGE.

CONFORMITY.

(*Affidavit of.*)

See CERTIFICATE.

CONTEMPT.

Where a party took forcible possession of the bankrupt's property whilst in the custody of the messenger, but, finding he had done wrong, gave up the possession again, the Court, on a petition to commit him for a contempt, only ordered him to pay the costs of the petition. *Ex parte Fletcher*, 2 M. D. & D. 129.

COSTS.

Appellant succeeding in reversing decision below, not entitled to. *Ex parte Burnett*, 2 M. D. & D. 357.

Petition praying for, if dismissed, is dismissed with costs. *Ex parte Columbine*, 2 M. D. & D. 24.

Where separate fiat is ordered to be annulled in favour of a joint one, and the petitioning creditor under the joint fiat is put to extra costs by the opposition of the assignees in establishing that fiat, an order was made that the assignees should pay him these costs out of the joint estate, and that they should be taxed as between solicitor and client. *Ex parte Sharp*, 2 M. D. & D. 531.

Costs of annulling a separate fiat, to give effect to a joint fiat, should come out of the joint estate, if that estate is sufficient to pay them. *Ex parte Peat*, 2 M. D. & D. 788.

Where an order was made against a party, who was a prisoner in the Queen's Bench, for the payment of the costs of a petition, an order may be made under the 1 & 2 Vict. c. 110, s. 18, to charge him in execution for the costs. *Semble*, that the Court of Review has in such case no authority to issue a writ of *habeas corpus* to bring up the party, in order that he may be charged on a warrant of commitment for nonpayment of the costs. *Ex parte Britten*, 2 M. D. & D. 335.

Quære if the Court of Review has jurisdiction to give costs to landlord petitioning that assignees may elect. *Ex parte Hopton*, 2 M. D. & D. 347.

Where the assignees set up a claim to goods taken in execution, and upon an issue under the Interpleader Act fail to sustain it, they must pay costs. *Melville v. Smark*, 3 Scott, N. R. 357.

And see INTERPLEADER.

Where parties entitled under a will petition for leave to prove under the bankruptcy of an executor, the assignees' costs come out of the bankrupt's estate. *Ex parte Bridgman*, 2 M. D. & D. 692.

In an administration suit against an executor becoming bankrupt, and who is at the same time indebted to the estate of his testator, the costs of the executor incurred before his

bankruptcy will be set off against his debt, and the costs after the bankruptcy incurred in the due execution of the trusts of the will, after the bankruptcy, will be allowed out of the testator's estate. *Samuel v. Jones*, 2 Hare, 246.

Neither the petitioning creditor nor the solicitor can petition for the payment of the costs up to the choice of assignees, without alleging and proving that the Commissioners made an order for the payment of them. *Semble*, that the solicitor cannot petition for the payment of these costs without the privity of the petitioning creditor. *Ex parte Cooper*, 2 M. D. & D. 420.

The plaintiff before action brought had assigned his property to trustees, in trust for the benefit of his creditors, and had also become both insolvent and bankrupt. The trustee brought an action in his name. *Held*, that the defendant was entitled to security for costs. *Elliot v. Kendrick*, 4 Per. & Dav. 306; 12 Ad. & El. 597, S. C.

The Court refused to compel the plaintiff to give security for costs, though it was sworn (and not denied) that he had been four times bankrupt, once discharged from custody under the Lords' Act, and thrice under the Insolvent Debtors' Act, his estate not having upon either occasion produced enough to pay his creditors 15s. in the pound, unless the defendant would not undertake to plead these matters; he having twice ob-

tained time to plead. *Alexander v. Townley*, 5 Scott, N. R. 452.

And see INTERPLEADER.

A solicitor's bill for business done under a *country fiat* (subsequently to the choice of assignees) is not a bill for "fees, charges, and disbursements at law or in equity," within the 2 Geo. 2. c. 23. s. 23. *Harper v. Williams*, 3 Scott, N. R. 97; 2 Man. & Gr. 815, S. C.

Where a solicitor persuaded a party to sue out a fiat as petitioning creditor, (who was afterwards chosen assignee,) upon an invalid act of bankruptcy, which was concerted between the solicitor and the bankrupt, and there did not appear any other act of bankruptcy to support the fiat; the Court refused to make an order on the assignee to pay the solicitor's bill of costs up to the choice of assignees. *Ex parte Woodward*, 2 M. D. & D. 249.

Where a petition has been dismissed with costs, the petitioner cannot have it reheard until he pays the costs, notwithstanding there has been no actual demand on him for the payment. *Ex parte Mudic*, 2 M. D. & D. 669.

(*As to Costs of appointing Inspector.*)

See INSPECTOR.

(*As to Costs relating to Petitioning Creditor's Debt.*)

See PETITIONING CREDITOR'S DEBT.

(*As to taxed Costs.*)

See PROOF.

COVENANT.

(*Not merged in Judgment.*)

See ANNUITY.

COURT OF REVIEW.

Quære, if it have concurrent jurisdiction with the Lord Chancellor to annul a fiat. *Atkinson v. Raleigh*, 2 Gale & Dav. 611.

CROWN.

See EXTENT.

DIVIDEND.

An official assignee, though he may decline to pay a creditor his dividend until he produces the security which he holds for his debt, is not justified in refusing to pay it on the production of such security. *Ex parte Saunders*, 2 M. D. & D. 599.

A creditor cannot petition for payment of a dividend unless the dividend was declared subsequent to the proof of his debt. *Ex parte Lee*, 2 M. D. & D. 780.

Legal right of general body of creditors to a dividend not delayed in favour of a creditor seeking to establish a lien, except in clear cases, or when his equity is manifestly preponderant. *Ex parte Thompson*, 2 M. D. & D. 761.

The Court will not suspend the payment of a dividend on the ground of a pending action against the creditor, in which it was sought to charge him as a partner with the bankrupt, after the very same ques-

tion has been litigated by the petitioner, and decided upon by the Court. *Ex parte Turquand*, 2 M. D. & D. [345](#).

(*As to Proof in respect of a Dividend paid by Estate of another Bankrupt.*)

See SURETY.

DOCKET.

(*Priority.*)

See FIAT.

DUTY.

See STAMP.

ELECTION.

See ASSIGNEES.

EQUITABLE MORTGAGE.

See MORTGAGE.

EQUITY.

(*Effect of Bankruptcy on Proceedings in.*)

See BANKRUPTCY.

ESCROW.

Where deed of assignment, purporting to be made by all three partners of a firm, and to convey all their personal estate and effects whatsoever, in trust for the benefit of creditors, was executed by one of them only: *Held*, that it operated to convey the share of the one who so executed. *Bowker v. Burdekin*, 11 Mees. & W. [128](#).

And where one of the partners executed such an assignment of the partnership property before, but the other did not execute until after a fiat in bankruptcy had issued: *Held*, in the absence of any thing to shew the deed was delivered as an escrow, that it amounted to an act of bankruptcy by the one who so executed it, and that his share of the partnership property passed to the assignees under the fiat. *Ibid*.

EVIDENCE.

Production of proceedings under separate fiat to prove act of bankruptcy under joint fiat. *Ex parte Sharp*, 2 M. D. & D. [350](#).

In trover by assignees, if defendant plead that they are not assignees, they may on that issue give evidence of any act of bankruptcy committed before the fiat. *Gibson v. King*, 1 Car. & Mar. [458](#).

In an action against the assignees of a bankrupt for seizing goods alleged to have been assigned to the plaintiff by the bankrupt before his bankruptcy, the bankrupt is a competent witness for the plaintiff to prove that the assignment was made for a valuable consideration, and in consequence of pressure, although the defendants rely on the assignment as constituting the act of bankruptcy. In such an action, when no notice has been given of disputing the trading, act of bankruptcy, or petitioning creditor's debt, the petitioning creditor having assigned his debt, and

executed a release to the assignees, is a competent witness for them to prove an act of bankruptcy prior to that on which the adjudication took place, for the purpose of overreaching the alleged assignment to the plaintiff. *Smith v. Groom*, 2 Mo. & Rob. [388](#).

In an action by the assignees of a bankrupt estate for a debt due to the estate, the bankrupt was called to negative a plea of payment to himself of the debt in the declaration mentioned before his bankruptcy. *Held*, that he was a competent witness, and that he might prove by parol that he had released the surplus of the estate without producing or otherwise proving any deed of release. *Lucas v. Eades*, 2 Dow. P. C., N. S. [424](#).

Deposition of a party may, before Commissioner, be read to contradict him, if notice of intention to read it have been given, and a copy furnished. *Ex parte Gem*, 2 M. D. & D. [99](#).

A fiat in bankruptcy issued on the 7th March 1842, and in an action of trover by the assignees for goods pledged by the bankrupt on the 28th February, the trading was disputed. The bankrupt was a boarding-house keeper, and sold wine to her boarders. *Held*, that a paper in the handwriting of the bankrupt, purporting to be an account between her and one of her boarders from December 1840 to May 1841, was not receivable in evidence to prove the trading, unless it could be shewn to have been writ-

ten before the bankruptcy: and held also, that a book containing accounts between the bankrupt and one of her boarders of dates antecedent to the bankruptcy, and to which the word "settled" was added in the bankrupt's handwriting, was also not receivable, unless it was shewn that the entries were written before the bankruptcy. *Gibson v. King*, 1 Car. & Mar. [458](#).

In an action brought by a bankrupt against his assignees to try the validity of the fiat, the petitioning creditor is not a competent witness to prove the debt due to him although he has assigned it over to a third person. *Carruthers v. Graham*, 2 Mo. & Rob. [368](#); 1 Car. & M. [1](#). S. C.

Where the petitioner was summoned and examined by the adverse party before the Commissioners, and stated a part of his examination in an affidavit in support of the petition: *Held*, that it was not receivable in evidence. *Ex parte Smith*, 2 M. D. & D. [113](#).

EXECUTION.

Issued under 1 & 2 Vict. c. 110. s. [18](#), for costs. *Ex parte Britten*, 2 M. D. & D. [335](#).

(Defeated by Bankruptcy.)

See PLEADING—WARRANT OF ATTORNEY.

(When protected.)

See NOTICE—PROTECTED TRANS-ACTIONS.

EXECUTOR.

Part of the effects which came into the hands of an executor's assignees on his bankruptcy consisted of specific assets of the testator. A suit in Chancery being instituted for the administration of the testator's estate, the proceeds of these assets were ordered by the Court of Review to be retained and invested, although no accounts had been taken, the suit in Chancery not having proceeded to a decree. *Ex parte Wright*, 2 M. D. & D. 401.

In an administration suit against an executor becoming bankrupt or insolvent, and who is at the same time indebted to the estate of his testator, the costs of the executor, incurred before his bankruptcy, will be set off against his debt, and the costs of the same executor, incurred in the proper performance of the duties of his trust after his bankruptcy or insolvency, will be allowed out of the estate. *Samuel v. Jones*, 2 Hare, 246.

On bankruptcy of, costs of assignees on petition to prove by persons entitled under a will come out of bankrupt's estate. *Ex parte Bridgman*, 2 M. D. & D. 692.

Executors, liable for the default of their co-executor, who had become bankrupt, held entitled, upon payment by them, to the benefit of the proof in bankruptcy against his estate. *Lincoln v. Wright*, 4 Beav. 427.

Effects in bankrupt's hands as executor *de son tort* held not to pass to assignees under sect. 72 of 6 G. 4, c. 16. *Ex parte Thomas*, 2 M. D. & D. 294.

Reversed by Lord Chancellor. 3 M. D. & D. 40.

(*Lien of, on Legacy for advances to Legatee.*)

See LIEN.

And see LEGACY—PROTECTED TRANSACTIONS.

EX PARTE APPLICATION.

Pending an appeal from an order directing the admission of a proof, a dividend meeting is held, and on the assignees opposing the payment of the dividend upon this proof, it is withheld, a fund being set apart to answer it. The creditor then presents a petition stating the non-payment of his dividend, but suppressing the fact of the fund being set apart, and praying costs personally against the Commissioners. On this petition and a corresponding affidavit, he obtains, *ex parte*, an order staying the dividend generally, the appeal being determined in his favour. Held, that the suppression in the affidavit on which the *ex parte* order was obtained disentitled him to any relief. Held also, that it was not a case for the Commissioners to pay costs, and the petition dismissed with costs as against them. *Ex parte Davidson*, 2 M. D. & D. 375.

EXPUNGING.

See PROOF.

EXTENT.

To a writ of extent in aid against a bankrupt, sued out long after the

issuing of the commission, the sheriff returns that the bankrupt was entitled to a sum standing in the name of the accountant in bankruptcy in the books of the Bank of England; that the accountant held the money in trust for the bankrupt, and that the sheriff had seized such money. On this return the Court of Exchequer made an order that the sheriff should pay over to the prosecutor of the extent the amount of his debt. On a petition by the sheriff to the Court of Review to order this money to be paid to him, *held*, that the finding of the inquisition and the sheriff's return were alike erroneous, and the Court therefore refused to make any such order. *Ex parte Magnay*, 2 M. D. & D. [671](#).

FACT.

(Question of.)

A New York house accepts bills for the accommodation of a Virginia house, on an agreement for reimbursement entered into by a London merchant, the correspondent of a Virginia house. Afterwards the London merchant enters into partnership, and by letter desires the New York house to consider all credits, advices, and instructions then in force from him as extending to the new firm, and to transfer any balances due to or from him to the new firm. The New York house reply that they will make up and transfer to the new firm the open accounts in joint exchange transactions, but that they hope to have the account current made up before

they carry the old account to the new firm. They afterwards pay the accommodation bills, and draw on the new firm for the amount. The new firm become bankrupt.

Held, 1st, That the question whether the liability of the new firm had been accepted in lieu of or in addition to the separate liability of the London merchant, was a matter of fact, and not a proper subject for a special case.

2nd. That under the circumstances the separate liability was discharged, and the New York house were only joint creditors. *Ex parte Jackson*, 2 M. D. & D. 146.

See also FRAUDULENT PREFERENCE.

FIAT.

Ordered to issue on affidavit of debt sworn in Scotland. *Ex parte Rumsey*, 2 M. D. & D. [571](#).

A. having committed an act of bankruptcy, *B.* lodged with the secretary of bankrupts the affidavit of debt required by the Bankrupt Act. *C.* subsequently, but on the same day, deposited with the officer both the affidavit of debt and the necessary bond. *Held*, that notwithstanding *B.*'s priority in lodging the affidavit, *C.* had the first regular docket, and was therefore entitled to have the commission against *A.* *In re Beale*, 2 D. & War. [375](#).

A separate fiat issued against one of four partners after a joint fiat issued against the others will be ordered to be directed to the same Commissioner, notwithstanding the part-

nership has been dissolved ; and the 17th sect. of the *6 Geo. 4. c. 16.* only applies to existing partnerships. *In the matter of Simmons*, *2 M. D. & D. 603.*

Attendance of the witness at the opening of fiat to prove the act of bankruptcy under *1 & 2 Vict. c. 110. s. 8.* dispensed with. *Ex parte Bowman*, *2 M. D. & D. 90.*

Time for opening fiat not enlarged on petition of bankrupt to facilitate a composition by means of trust deed. *Ex parte Drew*, *2 M. D. & D. 88.*

A separate fiat was annulled in favour of a subsequent joint one, notwithstanding the separate estate was more important than the joint estate, and one of the bankrupts intended to dispute his bankruptcy. If under such circumstances an inspector should become necessary to protect the interests of the separate creditors, the appointment will be at the expense of the joint estate. *Ex parte Burdikin*, *2 M. D. & D. 187.*

Where the bankrupt had carried on business in London, which was his last place of domicile, having been also engaged in mining speculations in Cornwall, and had been subsequently living with a relation near Dover under a feigned name, a fiat that had been issued to commissioners at Dover was ordered to be impounded, and the proceedings under it transferred to the Court of Bankruptcy in London, to which a renewed fiat was ordered to issue. *Ex parte Gregory*, *2 M. D. & D. 92.*

Although a fiat may be concerted between the bankrupt and the petitioning creditors, and may be lawfully issued to defeat an execution, still, if the main object is to serve the purposes of the bankrupt and the petitioning creditor, and not for the benefit of the general creditors, it will be annulled. *Ex parte Spicer*, *2 Mont. D. & D. 388.*

Where the act of bankruptcy was concerted between the solicitor, the petitioning creditor, and the bankrupt, for the sole purpose of defeating an execution creditor, and the solicitor was the prime mover of the plot, the fiat was annulled with costs. *Ex parte Barnett*, *2 M. D. & D. 325.*

(*For annulling Fiat.*)

See ANNULLING.

(*For Misnomer in Fiat.*)

See MISNOMER.

FIAT.

(*Second.*)

See SECOND FIAT.

FIFTEEN SHILLINGS IN THE POUND.

See SECOND FIAT.

FIXTURES.

Fixtures are not goods and chattels within *6 Geo. 4. c. 16. s. 72.* *Smith v. Grazebrooke*, *4 Scott, N. R. 565;* and *Ex parte Heathcoate*, *2 M. D. & D. 711.*

A trader mortgages the trade premises in fee, and then enters into part-

nership, and the firm carry on business on the same premises, and erect trade fixtures. *Held*, on their bankruptcy, that the mortgagee was entitled to the trade fixtures. *Ex parte Cotton*, 2 M. D. & D. 725.

A lessee erects trade fixtures firmly attached to the freehold, but removable as between himself and the landlord. He then mortgages the premises by way of demise, by the same description as that in the lease, and without reference to the erection, the sum secured being a floating balance limited to an amount greater than the premises would be worth without the fixtures: he becomes bankrupt. *Held*, that the mortgagee was entitled to the fixtures. *Ex parte Bentley*, 2 M. D. & D. 591.

The bankrupts purchased certain copyhold property, with various fixtures erected thereon, which were in law removeable as between landlord and tenant, as well as on the principle of the benefit of trade. They afterwards mortgaged the property, together with all these fixtures, describing them precisely in the words used in the purchase deed. After the mortgage they erected on the premises some other fixtures of the like nature, and continued in the possession of the whole property up to the period of their bankruptcy. *Held*, that all these fixtures passed to the mortgagee, as parcel of the mortgaged estate, and were not to be considered as goods or chattels in the order and disposition of the bankrupts at the

time of their bankruptcy, within the meaning of the 72nd section of the 6 Geo. 4. c. 16. *Ex parte Reynal*, 2 M. D. & D. 443.

A memorandum of deposit accompanying an equitable mortgage stated that the bankrupt had deposited the deeds and documents under which he held the steam mills, cottages, lands, buildings, and premises at L. *Held*, that the equitable mortgagee had a lien on the fixtures, whether erected before or after the time of the deposit, and including those that were moveable between landlord and tenant. *Ex parte Price*, 2 M. D. & D. 518.

And see MORTGAGE.

FRAUDULENT PREFERENCE.

A trader in a state of absolute insolvency, after an abortive attempt to compound with his creditors, and after having been served with a notice under the 1 & 2 Vic. c. 110. s. 8., sold his whole stock and effects by auction, and with the proceeds paid the composition he had offered, 7s. 6d. in the pound, to such of his creditors as would accept it, and amongst others to the defendant. The affidavit and notice were served on the 15th March, the payment was made to the defendant on the 5th April, and a fiat issued against the trader on the 6th. In the action by the assignees to recover back the money so paid, on the ground that it was a payment made in contemplation of a bankruptcy, the jury having returned a verdict for the defendant, the Court directed a new

trial. *Gibson v. Muskett*, 3 Scott, N. R. 419.

Whether or not a payment by a trader is made in contemplation of a bankruptcy, is so much a question of law, that though two juries have decided it in the negative, the Court, if satisfied that their conclusion is erroneous, will send the cause down to a third trial. *Gibson v. Muskett*, 3 Scott, N. R. 427; 4 Man. & Grang. 160, S. C.

And see ACT OF BANKRUPTCY—MORTGAGE—PROTECTED TRANSACTIONS.

FULL.

(Payment in.)

See SERVANT—LEGACY.

GOODWILL.

Of bankrupt's trade, so far as it is local, passes to assignees. *Ex parte Thomas*, 2 M. D. & D. 294.

HABEAS CORPUS.

Semle, that the Court of Review has no authority to issue a writ of, to bring up a party who is in custody, in order that he may be charged on a warrant of commitment for non-payment of costs. *Ex parte Britten*, 2 M. D. & D. 335.

HUSBAND AND WIFE.

See MARRIED WOMAN.

IMPOUNDING FIAT.

See FIAT.

INFANT.

Where the bankrupt applied to annul the fiat on the ground of infancy, and it appeared that on the occasion of his marriage a year before the fiat issued, he made an affidavit that he was then of age, his petition was dismissed with costs. *Ex parte Bates*, 2 M. D. & D. 337.

INJUNCTION.

Injunction in Chancery to restrain proceedings in the Court of Bankruptcy, under 1 & 2 Vict. c. 110, after decree for an account against the party taking these proceedings, refused under the circumstances. *Perry v. Walker*, 1 Y. & C. N. C. 672.

And see SET-OFF.

INSOLVENT DEBTORS' ACT.

Although a creditor whose debt has been inserted in the schedule of a party taking the benefit of the Insolvent Debtors' Act is not prevented from proving for the balance of his debt under a subsequent fiat against the insolvent, yet where the debt is founded on a warrant of attorney given by the insolvent, and a judgment thereon is entered up by him, in fraud of his creditors, the creditor cannot then prove for the balance under a subsequent fiat. *Ex parte Roric*, 2 M. D. & D. 631.

Assignment under, overreached by fiat. *Sidebotham v. Barrington*, 3 Bea. 524.

INSPECTOR.

Under a joint fiat, if the interests of the separate creditors require it, the Court will make an order for the appointment by them of an inspector to collect in the separate effects, with authority to bring actions, &c. in the names of the assignees. *Ex parte Wright*, 2 M. D. & D. [434](#).

Where an inspector is appointed to protect the interests of the separate creditors, the costs of and incidental to the application are directed to be paid out of the separate estate. *Ex parte Holford*, 2 M. D. & D. [485](#).

The Court will not order the appointment of an inspector of the separate estate of one of the bankrupts before the choice of assignees. *In re Daintry and Ryle*, 2 M. D. & D. [257](#).

(*At expense of what estates appointed.*)

See FIAT.

INTEREST.

Not paid to separate creditors out of separate estate till joint creditors have received principal. *Ex parte Wood*, 2 M. D. & D. [283](#).

Where one of two obligors in a joint and several bond had become bankrupt, and the obligee having by several dividends in the bankruptcy been paid [20s.](#) in the pound upon the amount of the principal and interest, due at the date of the commission, also carried in a claim in respect of the same bond, under a decree in a suit for the administration

of the estate of the co-obligor, who had died: *Held*, that the amount due to the obligee in respect of such claim was to be computed by treating the dividends as ordinary payments on account, that is, by applying each dividend, in the first place, to the payment of the interest due at the date of such dividend, and the surplus, if any, in reduction of the principal; and *semble*, that the same principle of computation is applicable in bankruptcy as between the bankrupt and his creditors, where there is a surplus of the estate after payment of [20s.](#) in the pound upon all the debts proved. *Bower v. Marri*, 1 Cr. & Ph. [351](#).

INTERPLEADER.

The assignee of a bankrupt having sued a banker for money deposited with him by the bankrupt, a third party claimed the money as part of a fund which the bankrupt held in trust. On an interpleader rule, the Court ordered an action to be brought in the name of the bankrupt against the assignees, the *cestui que trust* to find security for the defendant's costs. *Frost v. Heywood*, 2 Dowl. P. C. N. S. [801](#).

The assignees of a bankrupt having set up a claim to certain goods in the possession of a carrier, the latter applied to a judge under the first section of the Interpleader Act, when it was ordered, that unless cause was shown to the contrary on a day named, the assignees be barred their

claim, and pay the costs. The assignees attended on the day named, when the Order was discharged. Subsequently summonses were served, calling upon the plaintiffs and the assignees to state the nature and particulars of their respective claims. The assignees did not attend upon any of these summonses. *Held*, that the judge had no jurisdiction, under the interpleader act, to order the assignees to pay costs. *Grazebrook v. Pickford*, 2 Dowl. P. C. N. S. 248; 10 Mees. & Wels. 279, S. C.

JOINT AND SEPARATE ESTATE.

See INSPECTOR—PARTNERSHIP—PROOF.

JOINT STOCK COMPANY.

See BANKING COMPANY.

JUDGMENT.

The statute 6 Will. 4. c. 14. s. 126., which deprived creditors who have obtained judgment by confession against their debtor of preference in bankruptcy, has not been repealed by the effect of the 3 & 4 Vict. c. 105. *In re Perrin*, 2 Dr. & War. 147.

Creditors by simple contract are within the terms of the 3 & 4 Vict. c. 105. s. 22. *Ibid*.

A prior statute may operate upon the provisions of a subsequent one, without express words. *Ibid*.

A judgment debt is prevented by 3 & 4 Vict. c. 105. s. 22. from affect-

ing the right of simple contract creditors in bankruptcy, who became creditors before 1st November 1840. *In re Perrin*, 1 Con. & Law. 567.

2. A judgment being made a charge by the 22d section does not bring it within the exception as to "heirs," in 6 Will. 4. c. 14. s. 126. *Ibid*.

6 Will. 4. c. 14. s. 126., is not repealed by 3 & 4 Vict. c. 105. *Ibid*.

The conditional order heretofore issued in the first instance, on application for a receiver, under 5 & 6 Will. 4. c. 55. did not give the judgment creditor priority over the assignees of the debtor committing an act of bankruptcy intermediately between the times of obtaining the conditional and the absolute orders; nor had the subsequent orders relation back to the conditional order. *Burt v. Bernard*, 2 Con. & Law. 271.

(*Tacking judgment debt.*)

See MORTGAGE.

LACHES.

Where judgment was regularly signed, and execution levied on the 9th March, it was held too late to apply to set aside the judgment on the 28th April following, either at the instance of the defendant himself, or of his assignees, he having subsequently become bankrupt, although the latter were not aware until the 7th April of the irregularity existing in the judgment. *Weedon v. Garcia*, 2 Dowl. P. C. N. S. 64.

LANDLORD AND TENANT.

The 74th section of 6 Geo. 4. c. 16. applies only to rent accrued due before the bankruptcy. *Briggs v. Sowry*, 8 Mees. & Wels. 729.

When the assignees of a bankrupt have declined a lease to which the bankrupt was entitled, but the bankrupt has not delivered up the lease to the lessor, the property in the demised premises in the meantime continues vested in the bankrupt, and the lessor retains, until such delivery, his right of distress for the rent. *Ibid.*

Seemle, that the effect of that section is only to exempt the bankrupt from personal liability, and not to affect the landlord's right of distress. *Ibid.*

Seemle also, that it only applies to cases where covenants are broken, or rent becomes due, after the delivery up of the lease by the bankrupt. *Ibid.*

Quare whether it applies to the case of a demise not in writing. *Ibid.*

A landlord distrained the goods of *A.* on his tenant's premises for rent; the tenant afterwards became bankrupt, and obtained his certificate. *Held*, that the certificate did not operate as a release of the rent, and therefore that the landlord had a right in replevin at the suit of *A.* to avow for a return of the goods. *Newton v. Scott*, 9 Mees. & Wels. 434; *S. C.* affirmed on appeal in Exchequer Chamber, 10 Mees. & Wels. 471.

Parol lease is within 6 Geo. 4. c. 16. s. 75., as to assignees electing. *Ex parte Hopton*, 2 M. D. & D. 247.

LEASE.

See LANDLORD AND TENANT—
MORTGAGE.

LEGACY.

A pecuniary legatee is entitled to be paid in full out of a dividend payable on a proof made in respect of devastavit committed by a bankrupt who is executor and residuary legatee. *Ex parte Turner*, 2 M. D. & D. 613.

A testator, by his will, gives 2000*l.* to a daughter, to be paid as therein-after mentioned, and charges certain estates with the payment. In a subsequent passage he directs the daughter to let her legacy remain in the hands of the executors at interest till she should happen to marry, and that then and in such case the legacy should be paid by certain instalments by the executors, they contributing to the payments equally. He then devises the property charged, subject to the payment of the legacy, to three of his sons, whom he appoints his residuary legatees and executors, they paying his debts, funeral expenses, the legacy above mentioned, and certain annuities. *Held*, that the bequest was a vested legacy of 2000*l.*, and not merely a gift of the interest while the daughter remained single, with a contingent of

the principal in the event of marriage.
Ex parte Hudson, 2 M. D. & D. 177.

LIEN.

Where a solicitor was employed by the trustees under a trust deed in the preparation of the deed and the execution of the trusts, and the trustees were afterwards chosen assignees under a subsequent fiat in bankruptcy issued against the party, who had assigned his effects under the trust deed: *Held*, that the solicitor could not retain a sum which had come to his hands since the bankruptcy, in satisfaction of his charges relating to the trust deed. *Ex parte Dean*, 2 M. D. & D. 438.

The bankrupt's goods having been seized in execution nearly five years ago, the solicitor to the fiat, without the authority of the assignee, gave an undertaking to the sheriff's officer to indemnify him against the consequences of his relinquishing the possession of the goods, and returning *nulla bona*. *Held*, that he had not, by reason of his liability on this undertaking, any lien upon the bankrupt's money in his hands. *Ex parte White*, 2 M. D. & D. 436.

One of the several residuary legatees, with the concurrence of the others, induces the executors to sell out stock forming part of the residuary estate, and to lend him the proceeds on his executing to them a warrant of attorney, and depositing certain title deeds as a security for the replacement of the stock and

payment of the dividends, but without any express lien upon or reference to his share in the residue. *Held*, that the executors had on his bankruptcy a lien on the share. *Ex parte Makins*, 2 M. D. & D. 508.

A London firm advance money to a merchant who is about to make a consignment to their correspondents in Calcutta, and they take as a security the bill of lading, which they send to their correspondents, with an account of the transaction, and a direction for the latter to remit the return proceeds to the merchant through them. The correspondents sell the goods, and remit directly to the merchant a bill of exchange drawn upon the London firm for the full amount of the proceeds, in the following form: "Pay through your good selves, &c." The bill of exchange is received by the assignee of the merchant, who becomes bankrupt before its arrival. *Held*, that they are bound to give it up on being paid the difference between the proceeds of the sale and the advance made to the bankrupt, and that the London and Indian firms might properly join in presenting a petition to have the bill delivered up. *Ex parte Mackey*, 2 M. D. & D. 136.

And see MORTGAGE.

LIMITATION OVER, IN CASE OF BANKRUPTCY.

Subject to the life estate of her husband, a wife had the absolute power of appointing a trust fund, which in

default of appointment was limited to her next of kin, and there was a proviso, that if the husband became bankrupt, the dividends should no longer be paid to him. The wife died first, and appointed the fund to her husband. *Held*, that he became entitled thereto absolutely, and had a right to have a transfer thereof. *Neale v. Hodgson*, 5 Beav. 159.

Testator bequeathed his residuary estate to trustees, and after making a provision out of it for the benefit of his son for life, and after the son's death for his wife and children, directed that if his son should assign or charge the interest to which he was entitled for life, or agree so to do, or commit any act whereby the same or any part thereof might, if the absolute property thereof was vested in him, be forfeited to or become vested in any person or persons, then the trustees should pay and apply the said interest for the maintenance and support of his son, and any wife or children he might have, and for the education of such issue as the trustees should in their discretion think fit. Some years after the testator's death, the son became bankrupt. *Held*, that the trust for the benefit of the son, his wife and children, was valid, and that the assignees were not entitled to any part of the provision. *Godden v. Crowhurst*, 10 Sim. 642.

LIQUIDATED DEMAND.

The bankrupt undertook to supply

a creditor who was under pecuniary engagements for him with five pieces of cloth per week, or to forfeit and pay £10 per piece as liquidated penalty for every piece deficient. The bankrupt made such frequent default in the regular supply of the cloth, that he incurred penalties to the amount of 3870*l.*, which the creditor claimed to prove, although no specific damage was alleged to have been sustained by him by the non-performance of the agreement, and the only balance really due to him was 48*l.* 18*s.* 6*d.* *Held*, that this was a claim for unliquidated damages founded on a penalty, and was not therefore the subject of proof. *Ex parte Maclean*, 2 M. D. & D. 564.

Teas are sold to be paid for at appointed days, the sales being made according to the custom of the trade, whereby the goods when sold are left as a pledge for full payment with the vendor, who in case of non-payment is at liberty to resell, and charge the loss to the original purchaser. The purchase-money is not paid at the appointed time; the purchaser becomes bankrupt, and the vendor having sold part of the teas before the fiat and the rest afterwards, gives the estate credit for the clear proceeds of the sales, tendering a proof for the residue of the original purchase money. *Held*, that although there was no delivery of the goods, the original sale was a binding contract within the Statute of Frauds, and that the claim of the vendors constituted not unliquidated damages, but a proveable

debt. *Ex parte Moffatt*, 2 M. D. & D. 170.

LUNACY.

Of bankrupt is a ground for dispensing with his affidavit of conformity. *Ex parte May*, 2 M. D. & D. 381.

A trader being indebted to a lunatic in the amount of the purchase-money of a business and the machinery and stock in trade, after carrying on the business alone for some time, enters into partnership under an agreement by which the stock in trade and property of the sole business were to belong to the firm, which was to take upon itself the liabilities of the sole business. The firm renders an annual account in its own name in respect of the debt to the committee of the lunatic, who makes no objection to this form on the account. *Held*, on the firm becoming bankrupt, that the committee was not entitled to prove against the joint estate. *Quære*, whether he had power, and whether the Lord Chancellor would have given him power, to convert the separate into a joint liability. *Ex parte Parker*, 2 M. D. & D. 511.

MARRIED WOMAN.

The assignees of a bankrupt may maintain an action in their own names only for a chose in action belonging to the wife of a bankrupt before marriage, as a promissory note given to her *dum sola*. And in such action the defendant cannot set off a debt

due to him from the bankrupt. *Yates v. Sherrington*, 11 Mees. & Wels. 42.

Feme covert, petitioning by her next friend, permitted to prove the value of a legacy of stock bequeathed to her separate use, but transferred into the name of her husband, who sold it out and became bankrupt: and a trustee appointed to receive the dividends. *Ex parte Wells*, 2 M. D. & D. 504.

Assignees may sue alone on a promissory note given to bankrupt's wife before marriage. *Yates v. Sherrington*, 2 Dow. P. C. N. S. 803.

MARSHALLING OF SECURITIES.

See MORTGAGE.

MERGER OF SECURITIES.

See ANNUITY—MORTGAGE.

MISNOMER.

Semble, that a joint fiat will not be annulled on account of a misnomer in it of one of the bankrupts by the omission of one of his Christian names. *Quære*, whether such a misnomer of a trader in proceedings under 1 & 2 Vict. c. 110. s. 8., is a sufficient ground for annulling a fiat founded upon them. To prove the existence of such a misnomer, it is not enough to state that the trader was baptised by and always adopted another name than that by which he is described; it must appear that he was generally known by such other name. *Ex parte Richards*, 2 M. D. & D. 493.

MORTGAGE.

(How constituted.)

An equitable sub-mortgagee by re-deposit held to be entitled at law to retain the deposited documents against the assignees in bankruptcy of the original mortgagor, who brought an action of trover to recover the deeds. *Hobson v. Mellond*, 2 Mo. & Rob. [342](#).

Equitable mortgage may be created on deeds in the hands of a third party, and by a memorandum of agreement on the part of the mortgagor to assign his interest in the property comprised in the deeds. *Ex parte Heathcoate*, 2 M. D. & D. [711](#).

Brewers agree to advance money to enable a publican to pay the consideration for the purchase of the lease of a public-house, on the understanding that as soon as the lease is executed it shall be delivered to and deposited with the brewers as a security for the advance. The lease is accordingly made to the publican as lessee, but on its execution is delivered by the lessor immediately to the brewer's agent, who advances the money: a memorandum is at the same time signed by the publican, whereby he states the deposit to have been made by himself for the above purpose, and agrees to execute a legal mortgage by way of under-lease when required. The publican turns out to have been at the time an uncertificated bankrupt. *Held*, that the brewers had a good lien against the

assignees. *Meux v. Smith, Seager v. Smith*, 2 M. D. & D. [789](#); 11 Sim. [410](#), S.C.

To create an equitable sub-mortgage by re-deposit of deeds originally deposited by way of mortgage, it is not necessary that the written memorandum accompanying the first transaction should be deposited upon the second. *Ex parte Smith*, 2 M. D. & D. [587](#).

A shareholder in a company, the settlement deed of which prescribes a specified mode for the transfer of shares, and excludes from being shareholders all who are not shippers of goods, deposits the certificates of his shares by way of mortgage with a person not of the prescribed description, and without following the prescribed mode of alienating. *Held*, that the deposit created a valid lien as against his assignees on his becoming bankrupt. *Seemle*, that reputed ownership of shares must be proved to have existed, and is not conclusively to be inferred from the absence of notice of a lien upon them. *Ex parte Pooley*, 2 M. D. & D. [505](#).

Where a bankrupt had contracted to buy some shares in the United States Bank, the certificates of which were left in the hands of the vendor as a security for the payment of the greatest portion of the purchase-money: *Held*, that the vendor was entitled, as in the case of an equitable mortgage, to an order for the sale of the shares, in satisfaction of the unpaid purchase-money, with liberty to

prove for the difference. *Ex parte Sheppard*, 2 M. D. & D. 431.

A railway act prescribes a form of instrument for the transfer of shares, and provides that a memorial of the transfer shall be entered in the company's books, and that until such memorial shall be made, the purchaser shall have no share in the undertaking. A shareholder in the railway borrows money on a deposit of the certificates of his shares, with an assignment executed by him, but with the name of the transferee left in blank, and the blanks are not filled up before the shareholder becomes bankrupt. *Held*, that the depositary had a lien on the shares, and that the lien extended to sums paid by him in respect of calls. *Ex parte Dobson*, 2 M. D. & D. 685.

Mortgage of shares in a company by a director, with a stipulation that notice should not be given to the company, bad within 6 G. 4. c. 16. s. 72. *Ex parte Nutting*, 2 M. D. & D. 302.

And see REPUTED OWNERSHIP.

Trustee having a partial beneficial interest in the trust property may incumber his interest by a deposit of the title deeds. *Ex parte Smith*, 2 M. D. & D. 587.

H. and *F.*, the owners of a ship, sent her to Charlestown, where a cargo of cotton was put on board, with which he returned to this country. On her arrival here, the defendant, as mortgagee of the ship, took possession of the ship and cargo. *Held*,

that the assignees of *H.* and *F.*, who had become bankrupt before the arrival of the vessel, were entitled to maintain trover against the defendant for the cargo. *Brancker v. Molyneux* 3 Scott, N. R. 332.

(*Merger of Securities.*)

The bankrupt being the lessee under a lease for forty-six years, subject to a former lease for twenty years, deposits it by way of equitable mortgage, he afterwards purchases the remainder of the term granted by the first lease, and deposits that lease also with the same party for securing a further sum. *Held*, that the first lease was not under these circumstances merged in the second, and that the depositaries were good equitable mortgagees under both deposits. *Ex parte Whitbread*, 2 M. D. & D. 415.

(*Proximity to Bankruptcy.*)

The circumstance that a security has been obtained for an antecedent debt three weeks only before the issuing of the fiat, is not of itself sufficient to prevent the creditor from obtaining the usual order at once, without a preliminary inquiry. *Ex parte Heathcoate*, 2 M. D. & D. 711.

(*Extent of Security.*)

An agreement in writing accompanying the deposit of title deeds, to secure a specific sum, may be extended as a security beyond that sum by a subsequent verbal agreement.

Ex parte Nettleship, 2 M. D. & D. [124](#).

The expression "may advance," in a memorandum, does not conclusively confine the security to future advances. *Ex parte Smith*, 2 M. D. & D. [587](#).

(*As to Fixtures.*)

See FIXTURES.

(*Change of Firm.*)

The title deeds of property belonging to one of two partners in trade are deposited with a banking firm, to secure the balance of the account current between the banking firm and the partnership. On a particular advance being afterwards made by the former to the latter, the partner to whom the deeds belong writes a letter to the effect that the object of the deposit is to secure that "as well as any future advances." An alteration takes place in the members of the banking firm, but the new firm retain the deeds, and continue to advance money to the partnership. *Held*, that the existing banking firm were entitled to the benefit of the security. *Ex parte Smith*, 2 M. D. & D. [314](#).

(*Tacking.*)

A mortgagee by demise enters up judgment against the mortgagor on another debt, and dies; his executors take from the mortgagor a memorandum empowering them to hold the title deeds of the mortgaged property as a security for a part of the judg-

ment debt, in addition to the original mortgage debt. *Held*, on the mortgagor becoming bankrupt, that the executors might as against the second mortgagee tack the whole of the judgment debt to the mortgage. *Ex parte Cox*, 2 M. D. & D. [486](#).

Where the bankrupt executed several distinct mortgages of different estates, his assignees cannot apply to redeem the mortgage without also redeeming the others. *Ex parte Al-sager*, 2 M. D. & D. [328](#).

(*Marshalling.*)

Where there are two creditors who have taken securities for their respective debts, and the security of the first creditor ranges over two funds, while the security of the second is confined to one of these funds, the Court will marshal the assets so as to throw the person who has two funds liable to his demand on that which is not liable to the debt of the second creditor. The bankruptcy of the debtor will not prevent the application of the general rule, for the assignee stands in the position of the bankrupt. *Baldwin v. Belcher*, and *In re Cornwall*, 3 D. & W. [173](#); 2 Con. & Law. [131](#), S. C.

(*Sale.*)

Order for sale of part of the property comprised in a security, without prejudice to the creditor's lien upon the remainder, which was at the time unsaleable from being the subject of

litigation. *Ex parte Wace*, 2 M. D. & D. 730.

The Court of Review has jurisdiction to entertain a petition complaining of an abuse for the execution of an order made for the sale of property under an equitable mortgage, but the petition must be that of a creditor or party interested in the bankrupt's property, and who is also a party aggrieved. Where a petition praying for costs is dismissed, it will in generally be dismissed with costs. *Ex parte Columbine*, 2 M. D. & D. 24.

(*Who entitled to Rents and Profits of mortgaged Premises.*)

The mortgagee of property, which has been some time untenanted and unproductive, consents that the assignee of the bankrupt mortgagor shall let the premises to such person as he may think proper, the mortgagee stipulating that his consent is not to be considered as assuming the possession of the premises as mortgagee. In pursuance of this arrangement, the assignee lets the property, and receives the rents for a period of seven years, when the property is sold, but the proceeds of the sale are not sufficient to pay off the whole of what is due upon the mortgage. *Held*, that the assignee, and not the mortgagee, was entitled to these bygone rents. *Ex parte Carr*, 2 M. D. & D. 534.

(*Proof by Mortgagee how far facilitated by Court.*)

See PARTNERSHIP.

(*Proof without Sale of Security.*)

Mortgagee of joint estate, to secure joint debt, may prove a separate covenant, without giving up his security. *Ex parte Shepherd*, 2 M. D. & D. 204; *S. C. nom. in re Plummer*, 1 Phil. 56.

See PROOF.

NOTICE.

Notice of an act of bankruptcy, given to the sheriff or his officer in possession, is not notice to the execution creditor. *Ramsay v. Eaton*, 2 Dowl. P. C. N. S. 219.

Semble, that a general notice to an execution creditor that the defendant has committed an act of bankruptcy, is sufficient without particularly specifying it. *Ibid.*

See PROTECTED TRANSACTIONS.

In 1816 *D.* assigned a policy of insurance on his life to a trustee, to secure a sum of money owing to *W.*, and soon afterwards the solicitor of *W.* caused a memorandum to be entered in the office of the insurance company, directing that all letters were to be sent to such solicitor, and the premiums were thenceforth paid by *W.* through the hands of such solicitor, but the insurance company were not informed on whose behalf the solicitor acted. In 1826 *D.* became bankrupt, and his assignees declined to interfere as to the policy. The premiums continued to be paid by *W.* through his solicitor during his life, and by the executors of *W.*

through their bankers after his death. *D.* died in 1829.

Held, that the policy was in the order and disposition of the bankrupt, and that there was not any notice given to the insurance office of the assignment of the policy, to take it out of such order and disposition. *West v. Reid*, 2 Hare, [249](#).

That the conduct of the assignees did not amount to an abandonment of any right which they had to the benefit of the policy. *Ibid*.

That the executors of *W.* had a lien on the policy for the amount of the premiums, which had been paid by *W.*, and his estate and the interest thereon, and that they were entitled to payment thereof out of the monies payable under the policy. *Ibid*.

Negligence as applied to cases of constructive notice supposes the disregard of a fact known to the purchaser which indicated the existence of a fact, the knowledge of which the Court imputes to him, and such negligence may, without a fraudulent motive, be so gross as to justify the charge of constructive notice. *Semble. Ibid*.

A purchaser may be presumed to have investigated every instrument which directly or inferentially forms a link in the title to the property, but not instruments which are neither directly nor presumptively connected with it, and may only by possibility affect it. *Semble. Ibid*.

And see MORTGAGE—PARTNERSHIP
—REPUTED OWNERSHIP—TRUST.

NOTICE TO DISPUTE.

See PLEADING.

OFFICIAL ASSIGNEE.

The official assignee is liable to the costs of defending an action brought against him and the creditors' assignee, if he joined in retaining the attorney. *Sydney v. Belcher*, 2 Mo. & Rob. [324](#).

An official assignee disclaiming all interest in the suit may be dismissed on the hearing, with costs to be paid to him by the plaintiff, but in such case he must disclaim absolutely either by his answer, or at the bar. *Clarke v. Wilmot*, 1 Y. & C. Chanc. Ca. [53](#).

An official assignee who is removed has no right to retain the papers belonging to the bankrupt's estate in his hands until he is remunerated for his services under the fiat, and if he refuses to hand them over to his successor, he will be ordered to deliver them up with costs. *Ex parte Graham*, 2 M. D. & D. [290](#).

Where an official assignee, who had been removed from that office, neglected to pay over a sum of money which he had received under the fiat, he was ordered forthwith to pay the same, together with interest at the rate of [20%](#) per cent. for the time of his retention of the money. *Ex parte Turner*, 2 M. D. & D. [481](#).

ORDER AND DISPOSITION.

See REPUTED OWNERSHIP.

PAROL AGREEMENT.

See LIQUIDATED DEMAND.

PARTNERSHIP.

(How constituted.)

Where a negotiation took place between *B.*, *S. V. & Co.* and *E.*, as to the admission of *E.* as a partner with them, and *E.* drew out a sketch of the terms of the intended partnership, two of which were, that *E.* should bring in 2000*l.*, half in cash and half in goods, and that the firm should be altered to that of *B.* and *S. V. & Co.*, and *E.* accordingly advanced the 2000*l.*, upon which the words "& Co." were added to the original firm, but no other act was done by *E.* to show that he considered himself as a partner, and he refused to sign any formal agreement for a partnership. *Held*, that this was not sufficient to constitute him a partner with *B.* and *S. V.*, so as to prevent him from proving the amount of his advances as a debt due from them to him, under a fiat issued against *B.* and *S. V.* *Ex parte Turquand*, 2 M. D. & D. 339.

(Change of Firm and Dissolution, and Assignments thereupon.)

A., *B.* and *C.* dissolved their partnership, when *C.* executes a regular assignment of the partnership effects to *A.* and *B.*, and notice of the dissolution appears in the Gazette. *A.* and *B.* continue the business in the same firm until their bankruptcy, which is more than a twelve month

after the dissolution and assignment. *Held*, that a joint creditor of *A.*, *B.* and *C.* could not prove against the estate of *A.* and *B.* *Ex parte Gurney*, 2 M. D. & D. 541.

A. carries on the business of a grocer separately, and also that of an iron-founder in partnership with *B.* After this trading for four years, he sells off the stock of the grocery business, and retires wholly from that trade, investing the proceeds in the iron-foundry business, which, with the exception of a small sum brought in by *B.*, constituted the whole capital of the partnership. A joint fiat is issued against *A.* and *B.* sixteen months after *A.* had retired from his separate grocery trade. *Held*, that the creditors of *A.* in the grocery trade could not prove against the joint estate of *A.* and *B.* *Ex parte Graham*, 2 M. D. & D. 781.

L. and *C.* employed packmen to travel round various districts in the country to sell their goods, in the course of which dealings were had with 3500 customers. *L.* and *C.* dissolved their partnership, of which notice was given in the Gazette, and sold the debts owing on these different rounds to the new firm of *S.* and *C.*, which continued the same course of dealing, and some of the bills of parcels delivered to the customers by one of the packmen were altered in the heading from the firm of *L.* and *C.* to that of *S.* and *C.*; but it did not appear that any express notice was given to the customers of

the assignment of the debts from the old to the new firm: both firms became bankrupt. *Held*, under these circumstances, that there was not such proof of want of notice to the different debtors of the debts from the old to the new firm as to raise the inference that the debts continued in the order and disposition of the former. *Ex parte Woodgate*, 2 M. D. & D. 394.

A consignment is made by one firm to another through a third, who make an advance to the first on an agreement for a lien upon the return proceeds. The proceeds are accordingly remitted to them; but before their arrival the consignors have dissolved partnership, and separate fiats have issued against each of them. By the dissolution deed it is agreed that a certain portion of the partnership credit should belong to, and a certain portion of the partnership debts should be paid by, one of the partners, to whom, in pursuance of this agreement, the assignee of the other partner transfers all his interest in the above-mentioned return proceeds. *Held*, that this interest constituted separate and not joint estate. *Ex parte Birley*, 2 M. D. & D. 354.

A small debt of 1*l.* 14*s.* 6*d.* due to the firm before its dissolution, *held*, under the circumstances of the case, not joint property for the purpose of preventing a joint creditor from receiving dividends out of the separate estate. *Ibid.*

A. and B. dissolve their partner-

ship, when *B.* assigns all the joint property to *A.*, among which are debts due to the firm to the amount of 60*l.*, but no notice of the assignment is given to the debtors. *A. and B. severally become bankrupt. Held*, that a joint creditor, who had proved under the separate fiat against *A.*, was entitled to receive dividends on his proof. *Ex parte Taylor*, 2 M. D. & D. 753.

A. and B., who are partners trading under the style of *C. & Co.*, sign a guarantee by their private names only in the following form: "The undersigned hereby guarantee, &c." *Seemle*, the proof in bankruptcy upon this guarantee must be made against the joint estate, if there were any; but the partnership having been dissolved after the signature of the guarantee by an agreement by which *B.* was to be made the sole owner of the stock, debts and effects of the firm, he taking on himself its liabilities, *held*, that a mere general statement that at the time of the dissolution there were outstanding credits amounting to 200*l.*, and that credits to the amount of 10*l.* were recoverable, without particularizing them, was not sufficient ground for preventing creditors under the guarantee from receiving dividends out of *B.'s* separate estate. *Ex parte Burdekin*, 2 M. D. & D. 704.

(*As to Effect of Change of Firm on Mortgage.*)

See MORTGAGE.

(*Substitution of Liability of new Firm.*)

See FACT, QUESTION OF—LUNACY.

(*Joint or separate Liability, Proofs in respect of.*)

Creditor not allowed to retire from proof against joint estate and to tender one against separate estate, without special grounds. *Ex parte Dixon*, 2 M. D. & D. 312.

A., B. and C., who are in partnership, are joint owners of a ship with D., the managing owner, who contracts a debt with the petitioners for goods supplied for the use of the ship. A., B. and C. become bankrupt. *Held*, that the petitioners could not prove against their joint estate, but only against the separate estate of each of the bankrupts. *Ex parte Benson*, 2 M. D. & D. 750.

See last Subdivision, and title PROOF.

By a partnership deed, a partner, entitled to one-fourth of the capital and profits, engages to furnish more than his proportion of the capital if required, it being agreed that the excess should at his death be secured to his representatives by a mortgage of the partnership property, he having power to appoint by will one or more of his sons to succeed to his fourth part.

By his will he appoints such of his sons to succeed him as should be selected by his widow and one of his partners, whom he appoints his executrix and executor, but directs that during the minority of the sons, and after providing for their maintenance,

the surplus profits of his share should fall into his residuary estate.

At his death, his sons being minors, the business is carried on as before, the testator's representatives taking his place, but not taking or calling for any security for the debts due to his estate in respect of the excess of capital advanced by him. On the widow dying, and the surviving partners becoming bankrupt, *Held*,

1. That there could be no right of proof on behalf of the testator's estate against the joint estate of the surviving partners in respect of his debt.

2. That even if there could, those interested in the testator's estate were not entitled to have the dividends stayed or a fund reserved till the hearing of a cause, which was to decide upon their right to a lien on their partnership property in respect of this debt, the legal right of the general body of creditors to a dividend never being delayed at the instance of a creditor claiming a preference, except in clear cases, or where his equity is manifestly preponderant. *Ex parte Thompson*, 2 M. D. & D. 761.

Joint creditors who have proved under a separate fiat are entitled to receive a dividend on their proofs out of the surplus of the separate estate before the separate creditors are paid interest on their debts. A petition by joint creditors for this purpose should be served upon the bankrupt's executor. *Ex parte Wood*, 2 M. D. & D. 282.

A partnership firm mortgage part of the joint estate to secure a joint debt, and by the mortgage deed covenant jointly and severally for payment of the debt. *Held*, that on their bankruptcy the mortgagee might prove the whole debt against the separate estate, without giving up the security. *Ex parte Shepherd*, 2 M. D. & D. 204; *S. C. nom. in re Plummer*, 1 Phil. 56.

The rule that a joint creditor suing out a separate fiat shall receive dividends on his joint debt out of the separate estate *pari passu* with the separate creditors, applies to a case where, besides the joint debt, there is due to the joint creditor from the bankrupt a separate debt of sufficient amount to support a fiat. The point having been decided against the creditor by the Commissioners and by the Court of Review, *held*, that he was not entitled to costs. *Ex parte Burnett*, 2 M. D. & D. 357.

(*Fiat against Partnership.*)

See FIAT.

(*Proof between Partners.*)

Ex parte Cooper, 2 M. D. & D. 1.

And see BANKING COMPANY.

(*Liability of Firm for Tort of one Partner.*)

See PROOF.

PAYMENTS.

(*Appropriation of.*)

See SURETY.

PERJURY.

Commissioners acting under a fiat in bankruptcy adjudicated *A.* to be a bankrupt, and afterwards *B.* was examined before them touching the estate of *A.*, and gave evidence which was alleged to be false: *B.* being indicted for perjury, it appeared on the trial that the petitioning creditor's debt, on which the fiat had issued, was not of sufficient amount; but it also appeared that *A.* owed other debts which might have been substituted for the petitioning creditor's debt by the order of the Lord Chancellor, under section 18 of 6 Geo. 4. c. 16. so as to have rendered the fiat valid, but that no such order had been made. *Held*, that under these circumstances, *B.* could not be guilty of perjury on this his examination. *Reg. v. Ewington*, 1 Carr. & Mar. 319.

But *semble*, that if *B.* had been examined by the Commissioners on the preliminary proceedings before them, to ascertain whether *A.* should be adjudged a bankrupt or not, *B.* might have been guilty of perjury, even though there had been no good petitioning creditor's debt. *Ibid.*

PETITION.

Not presented, no order as to hearing of. *Re Campion*, 2 M. D. & D. 671.

Of married woman, in respect of separate property, should be by her next friend. *Ex parte Wells*, 2 M. D. & D. 504.

The Court will hear the petition of a marksman, although the attestation

of it is defective in not stating that the petition has been read to him, if the petitioner's affidavit, being an echo of the petition, is expressed in the jurat to have been read to him. *Ex parte Washbrook*, 2 M. D. & D. 490.

A petition complaining of the rejection of a proof neither sets forth the grounds of the rejection, nor states that none were assigned. *Held*, the petition might nevertheless be heard. *Ex parte Mudie*, 2 M. D. & D. 490.

A petition states a transaction in such a way as to imply an assent to it on the part of the petitioner; but the allegation from which the inference arises is not contained in the petitioner's affidavit in support of the petition. An order having been made, a petition of rehearing on the ground of surprise, supported by an affidavit that no assent had been given, and that the allegation in the petition had been only suffered to remain unexplained, because it was not considered that any question would turn upon it, was dismissed with costs, the Court holding that the allegation amounted to an assent, on the footing of which the order was made. *Ex parte Eyre*, 2 M. D. & D. 84.

And see PRACTICE.

PETITIONING CREDITOR.

Seemle, the Bank of Ireland may be. *In re Beale*, 2 Dr. & W. 275.

Petitioning creditor having a joint and also a separate debt, each of sufficient amount to support a fiat, and suing out a separate fiat, may receive dividends out of the separate estate in respect of his joint debt *pari passu* with the separate creditors. *Ex parte Burnett*, 2 M. D. & D. 357.

Petitioning creditor cannot petition for payment of costs up to choice of assignees, before the Commissioner have ordered payment; and *seemle*, he is a necessary party on a petition being presented by the solicitor for payment. *Ex parte Cooper*, 2 M. D. & D. 420.

In an action, brought by a bankrupt against his assignees to try the validity of the fiat, the petitioning creditor is not a competent witness for the defendant to prove the petitioning creditor's debt, and the fact of his having assigned his debt will make no difference. *Carruthers v. Graham*, 1 Car. & M. 5; 2 Moo. & Rob. 368, S. C.

PETITIONING CREDITOR'S DEBT.

Need not be in existence before fraudulent warrant of attorney sought to be set aside by assignees. *Everett v. Wells*, 2 Scott N. S. 525; 2 Man. & Gr. 269, S. C.

(*Invalidity of, and substitution of new Petitioning Creditor's Debt.*)

Quære, whether a debt for which a bill of exchange is given is thereby

completely extinguished so as to be incapable of supporting a fiat, if the bill be negotiated and be out of the possession of the creditor at the time of the act of bankruptcy. Where on a petition to annul for want of a petitioning creditor's debt, the validity of the debt is a fair subject of doubt, the Court will allow the petition to stand over, to give time for an application to substitute a new petitioning creditor's debt. *Ex parte Magnus*, 2 M. D. & D. 604.

Where the assignees failed in an action owing to the invalidity of an order substituting a new petitioning creditor's debt, and a new trial was ordered, the Court refused to order that no application should be made to it as to the substitution of such debt, without notice to the defendant in the action. *Ex parte Molyneux*, 2 M. D. & D. 572.

A creditor having obtained an order to substitute his own debt for that of the petitioning creditor, and having applied afterwards to the Court to amend the order, which proved defective through a clerical slip of the officer in drawing it up, the defendant in a pending action petitioned against the amendment, or if such should be directed that the original order might not be dated prior to the order of amendment. *Held*, that the Court ought not to entertain such an application. *Ex parte Molyneux*, 2 M. D. & D. 656.

On a petition to substitute a new petitioning creditor's debt, and

on it appearing that the petitioning creditor was in insolvent circumstances, the Court ordered that, if the costs could not be recovered from him, they should come out of the estate. *Ex parte Sherborn*, 2 M. D. & D. 693.

An order to substitute a petitioning creditor's debt was amended for the purpose of stating that the creditor applying to have his debt substituted had proved a sufficient debt before making the application. *Ex parte Fletcher*, 2 M. D. & D. 654.

By an order of the Court of Review, under 6 Geo. 4. c. 16. s. 18., for substituting a new debt in lieu of the petitioning creditor's debt, upon which a fiat had issued, reciting that certain persons had preferred a petition to the Court, setting forth among other matters, "that a fiat in bankruptcy, bearing date the 9th June 1837, was duly awarded and issued against the bankrupts, under which they were duly proved and declared bankrupts, and that the petitioning creditor had duly proved a debt under the fiat, and were creditors of the bankrupts for the sum of 150*l.*, being the balance of an account for money had and advanced to the bankrupts by the petitioners on the 13th May 1837, and that the same debt was incurred by the bankrupts not anterior to the debt of the said petitioning creditor under the fiat, and praying that the Court would be pleased to order and allow the debt of the said petitioners to be substituted for the debt of T.

R., with proceedings under the fiat, and that it might be proceeded in and deemed valid, &c.—*it was declared that the debt of T. R.*, upon which the adjudication was made, *was an insufficient debt*, and then the order proceeded, *and it appears to the Court that the debt of the petitioners*, proved by them under the said fiat, or so much thereof as is sufficient to support such fiat, *was incurred not anterior to the said debt of the said T. R.*, and is an existing and sufficient deb. to support the said fiat, the Court ordered, &c." *Held*, that the order was invalid, inasmuch as it contained *no adjudication* that the debt of the petitioner had been proved under the fiat *at the time they presented their petition*, as required by the statute. *Brancker v. Molyneux*, 4 Scott N. R. 753.

2. The order was originally issued before the commencement of the action, but after two trials had taken place, and just on the eve of a third, the assignees procured it to be amended by more fully reciting the petition upon which it proceeded, the defendant having no notice of the application for such amendment. *Held*, that the order amended must be taken to speak from its original date; and that the want of notice to the defendant was no ground of objection. *Ibid*.

It is not necessary that the Commissioners should certify that the debt of a creditor proposed to be substituted for that of the petition-

ing creditor has been incurred not anterior to the debt of the petitioning creditor, if the Court is satisfied of the fact by other evidence. *Ex parte Pubery*, 2 M. D. & D. 184.

And see BILL OF EXCHANGE.

PLEADING.

To an action of trespass quare clausum fregit, a plea of the plaintiff's bankruptcy is bad on general demurrer. *Spence v. Rogers*, 2 Dow. N. S. 999.

The declaration in an action for maliciously suing out a fiat in bankruptcy contained an allegation that it was ordered by the Court of Review that the said fiat should be annulled, and the same was accordingly annulled, and the proceedings on the said fiat were thereupon ended and determined. The order of the Court of Review was, that the fiat be annulled if the Right Hon. the Lord Chancellor shall think fit, and at the foot of it was a confirmation of it signed by the Lord Chancellor. *Held*, that the allegation was substantially proved. *Kemp v. King*, 1 Car. & M. 396.

To trover by assignees of *H.* and *L.* against the sheriff, the defendant pleaded that one *H.* and one *L.* being indebted to *S.*, he sued out a fi. fa. directed to defendant as sheriff, and thereupon after *H.* and *L.* became bankrupts, and before the fiat, he took the goods in execution, and that afterwards a fiat issued, under

which the plaintiffs were appointed assignees, and as such entitled to the possession of the goods, which possession is the possession in the declaration mentioned. *Held*, 1, that the defence might be given in evidence either under the plea of not possessed or not guilty. *Unwin and another v. St. Quintin*, 2 Dow. P. C., N. S. 790; 11 Mees, & W. 277.

2. That the plea was not an argumentative plea of not possessed. *Quære*, whether bad as an argumentative denial of the plaintiff's title. *Ibid*.

3. That it sufficiently appeared that the persons named in the plea as bankrupts are the same as those mentioned in the declaration. *Ibid*.

4. That it was necessary to aver that the seizure or fiat was after the passing of the 2 & 3 Vict. c. 29. *Ibid*.

The sheriff seized under a fi. fa. at the suit of *G.* certain goods in the possession of one *W.* The goods were claimed by *C.* and *H.* respectively under three several mortgages from *W.* Upon an issue directed under the Interpleader Act to try their right, *C.* and *H.* being plaintiffs and *G.*, the execution creditor, defendant. *Held*, that it was competent to set up the title of the assignees of *W.*, who had become bankrupt. *Chase v. Goble*, 3 Scott N. R. 245.

Certain goods of one *S.* having been taken under a fi. fa., the assignees of *S.* (who had been declared a bankrupt) preferred a claim,

whereupon an issue was directed under the Interpleader Act, in which the assignees were plaintiffs, and the execution creditors defendants, to try whether at the time of the seizure of the goods the plaintiffs were entitled to the same as against and free from the execution, or whether the goods were subject and liable to be so seized and levied under the said writ or not as against the plaintiffs. *Held*, that this put in issue the bankruptcy of *S.* *Lott v. Melville*, 3 Scott N. R. 346.

Held also, that a feigned issue is not within 6 Geo. 4. c. 16. s. 90., so as to require the defendant to give notice of his intention to dispute the petitioning creditor's debt, trading, or act of bankruptcy. *Ibid*.

In an action on the case for maliciously suing out fiat in bankruptcy, the usual allegation in the declaration as to the annulling of the fiat is not put in issue by the plea of not guilty. *Atkinson v. Raleigh*, 2 Gale & Dav. 611.

A declaration for maliciously suing out a fiat, "that it was duly ordered, to wit, by the Court of Review, then having competent power in that behalf, that the said fiat should be and the same was then rescinded and annulled, and the proceedings were thereupon wholly ended and determined. *Held*, after verdict, that the declaration was good, even if no one but the Chancellor could annul the fiat. Evidence that it was annulled by him would have supported the

concluding allegation that the proceedings were ended, which was independent of the preceding allegation as to the Court of Review. *Ibid.*

Eighty-five bundles, of the value of 114*l.*, had been delivered by the bankrupt to the defendants, as they alleged, to meet an accommodation bill which they were about to give the bankrupt. The goods were accompanied by an invoice, which stated them to be bought by the defendants of the bankrupt. *Held*, that under these circumstances the assignees might waive the tort, and bring assumpsit for goods sold and delivered. *Russell v. Bell*, 10 Mees. & W. 340.

To an action for goods sold and delivered, the defendant pleaded puis darrein continuance, that on the 13th July 1843, the plaintiffs were bankrupt, and that afterwards an official assignee was appointed, and after the last pleading in the cause and within eight days now last past the creditors' assignees were chosen. *Held* bad, for not shewing that the official assignee was appointed within eight days after the plea. *Dunn and another v. Hill and another*, 2 Dow. P. C., N. S. 1062.

In equity a plea on information and belief of plaintiff's bankruptcy is good. *Kirkman v. Andrews*, 4 Beav. 554.

POLICY OF INSURANCE.

See REPUTED OWNERSHIP.

VOL. II.

PRACTICE.

Affidavit of debt sworn in Scotland, fiat issued upon. *Ex parte Rumsey*, 2 M. D. & D. 571.

(Annulling.)

See ANNULLING.

(Hearing of petition.)

Where the petitioner made out a new case in his affidavits in reply, which were filed only three days before the petition was set down for hearing, the Court permitted the hearing to be postponed, in order that the respondent might have time to answer the affidavits, but as he had given no notice of the application, he was ordered to pay the costs of the day. *Ex parte Rogers*, 2 M. D. & D. 503.

Where a petition is set down for further directions, and comes on also by way of exceptions to the registrar's report, the petitioner's counsel are entitled to begin. *Ex parte Butler*, 2 M. D. & D. 731.

No order as to the hearing can be made on a petition not yet presented. *In re Campion*, 2 M. D. & D. 671.

Practice on application to set down two petitions of different parties to come on together. *Ex parte Abbott*, 2 M. D. & D. 64.

Bankrupt not entitled to a copy of the depositions on which the adjudication proceeds on his petition to annul. *Ibid.*

(Service.)

On a petition for payment of a dividend 3 L

vidend, it is unnecessary to serve the creditors' assignees with the petition, and if they are served, the petitioner must pay the costs of their appearance. *Ex parte Saunders*, 2 M. D. & D. 529.

Petition by joint creditors to be paid principal out of surplus of separate estate should be served on bankrupt's executor. *Ex parte Wood*, 2 M. D. & D. 282.

(*Evidence.*)

Deposition of a party before Commissioner may be read to contradict subsequent statements, if notice of intention to read it be given, and a copy furnished. *Ex parte Gem*, 2 M. D. & D. 99.

Notice must be given of intention to read as evidence part of examination before Commissioner. *Ex parte Smith*, 2 M. D. & D. 113.

Production of proceedings under separate fiat to prove act of bankruptcy under joint fiat. *Ex parte Sharp*, 2 M. D. & D. 350.

And see EVIDENCE.

(*As to ex parte application, concealment of fact upon.*)

See EX PARTE APPLICATION.

PROMISSORY NOTE.

The assignees of a bankrupt may sue alone on a promissory note given to the bankrupt's wife before marriage. *Yates v. Sherrington*, 2 Dowl. P. C. N. S. 803.

In an action by the holder of a promissory note, indorsed generally

by the payee, to a plea that the payee indorsed it after he became bankrupt, the plaintiff replied, that he *bond fide* took and received the note before the payee became bankrupt, without any notice of any act of bankruptcy, and not by way of fraudulent preference. It appearing that the payee indorsed the note in blank, before he became bankrupt, to a person who delivered it after the bankruptcy, *held*, that the defendant was entitled to a verdict on the issue. *Green v. Davidson*, 1 Gale & Dav. 499.

And see SURETY.

PRINCIPAL AND SURETY.

See SURETY.

PRIORITY.

See MORTGAGE—JUDGMENT.

PROCEEDINGS.

Assignees under a separate fiat ordered to produce the proceedings under the fiat at the opening of a joint fiat against the same bankrupt and his partners, for the purpose of proving the act of bankruptcy, although the Commissioners had declined to order the proceedings to be produced. *Ex parte Sharp*, 2 M. D. & D. 350.

Bankrupt not entitled to a copy of, on application to annul. *Ex parte Abbot*, 2 M. D. & D. 64.

PROOF.

(*For Annuity.*)

See ANNUITY.

(*By assignee of another bankrupt.*)

Must be supported by affidavit of such bankrupt. *Ex parte Robson*, 2 M. D. & D. [65](#).

(*By Banking Company.*)

A member of a joint stock banking company kept an account with them as his bankers, and at the time of his bankruptcy was indebted to them in a large balance on such banking account, the company being also considerably indebted to various other persons. *Held*, that the company had a right of proof against the bankrupt for the balance due on such banking account. *Re Caldecott*, 2 M. D. & D. [368](#).

And see BANKING COMPANY.

(*On Bills of Exchange.*)

The plaintiff accepted two bills drawn upon him by the defendant for value. Before they arrived at maturity, the plaintiff, being unable to meet them, it was agreed that he should accept other two bills in lieu of them, in consideration of which the defendant undertook to provide for the first two, which he had negotiated; the defendant, however, failed to perform his engagement, and the plaintiff was compelled to pay all the bills. The two first bills became due *before*, but were not taken up by the plaintiff until *after* the issuing of the fiat against the defendant. In an action against the defendant for a breach of the indemnity, *held*, that the bills constituted a debt of the bankrupt for which the plaintiff was

liable at the time the fiat issued, within the meaning of the 52d section of 6 Geo. 4, c. 16, and consequently that the certificate was a bar. *Filbey v. Lawford*, 4 Scott, N. R. [208](#). Affirmed on error in Exchequer Chamber, 4 Scott, N. R. [611](#).

Proof admitted on bill of exchange obtained by fraud, where holder was ignorant of the fraud. *Ex parte Samuel*, 2 M. D. & D. [384](#).

(*Ascertained amount—Liquidated demand.*)

Where a plaintiff obtained a decree against the defendant, referring it to the Master to take an account of what was due to the plaintiff, and that what the Master should so find to be due should be paid to the plaintiff with costs, to be taxed by the Master, and the Master did not make his report until after a fiat had issued against the defendant: *Held*, that the decree was not final, and therefore the plaintiff was not entitled to prove for the amount of the debt and costs found due by the Master's report. *Ex parte Crosse*, 2 M. D. & D. [308](#).

The plaintiff, in an action at law, obtains a judge's order for payment of the debt and costs on a particular day, in default of which he is to be at liberty to sign judgment; but the defendant not being able to pay the debt at the time specified, the plaintiff extends the time of payment, before the expiration of which the defendant becomes bankrupt, and the

costs are not taxed until after his bankruptcy. *Held*, that the plaintiff could prove for the amount of the taxed costs as well as for the principal sum. *Ex parte Ferris*, 2 M. D. & D. 746.

And see LIQUIDATED DEMAND.

(*Liquidated demand—Joint or separate debt.*)

A customer, who keeps at his banker's for safe custody a box, to the key of which the bankers have access, lends to a partner in the bank some railway bonds contained in the box, on the security of certain certificates, which are thereupon deposited in the box, together with a memorandum stating the circumstances of the loan, but not fixing any time for the replacement of the bonds. Afterwards the partner, without the customer's knowledge, removes the certificates, and substitutes for them other securities, and the firm becomes bankrupt. *Held*,

1. That the joint estate was not liable in respect of the abstraction of the certificates.

2. That, although no time was fixed for the replacement of the bonds, the abstraction of the certificates rescinded the loan, and gave the customer the right of proof against the separate estate of the partner, the authority of *Utterson v. Vernon* not applying to such a case.

3. That the sum provable was not the value of the certificates, but the value of the bonds at the time of the abstraction of the certificates.

4. That the customer was entitled to an order for a sale of the securities substituted without his knowledge, with leave to prove for the difference between the proceeds and the value of the bonds. *Ex parte Eyre*, 2 M. D. & D. 66.

The same customer lends other railway bonds to the firm, on having deposited in his box, as a security, railway bonds of a different description, together with a memorandum, engaging the firm to replace the original at or within the expiration of three months, if required so to do. On a petition stating this transaction, and that the substituted bonds had been withdrawn and others substituted for them, but not stating that any request for replacement of the original bonds had been made, nor containing any statement as to the customer's knowledge of the last substitution, except one, to the effect that the substitution was made at the request of the firm. *Held*, that the customer had no provable debt in respect of the loan. *Ibid.*

(*As to Proof in respect of joint and separate debts.*)

See LUNACY—PARTNERSHIP.

(*Misconduct of creditor.*)

A., an innkeeper, assigns the premises and furniture to B., as his successor in the inn, and places his son, who was a minor, with B. at a yearly salary in the first instance, but upon the understanding that he was afterwards to be taken in as a partner.

The license is transferred to *B.* and *A.*'s son jointly; and *B.* becomes bankrupt after contracting a large debt with *A.*; the proof of which is rejected by the Commissioners on the ground that *A.* concealed his son's minority, and thus induced parties to trust the bankrupt, who had no capital. *Held*, that the Commissioners were not justified in rejecting the proof. *Ex parte Archer*, 2 M. D. & D. 784.

(*Payment in full on proof.*)

A pecuniary legatee is entitled to payment in full out of the dividend, in respect of a proof upon a devastation of a bankrupt who is executor and residuary legatee. *Ex parte Turner*, 2 M. D. & D. 613.

And see SERVANTS.

(*Where there is a security for the debt.*)

Where the bankrupt and his wife executed a power of appointment of the wife's estate to a creditor as a security for a debt due from the bankrupt, *held*, that the creditor might prove for the whole debt without giving up the security, it being incumbent on him to recover what he could from the bankrupt's estate before he resorted to the property of the wife. *Ex parte Hedderly*, 2 M. D. & D. 487.

A partnership debt secured by a joint and several covenant may be proved against the separate estate without relinquishment of joint secu-

urity. *Ex parte Shepherd*, 2 M. D. & D. 204; 1 Phil. 56, S. C.

(*Tort of partner.*)

See LIQUIDATED DEMAND—PROOF.

(*Expunging Proof.*)

A petition to the Court of Review to expunge a proof may be presented by one creditor; *aliter*, if the application is made to the commissioner when it must be by two or more, under the 6 Geo. 4. c. 16. s. 60. *Ex parte Broadley*, 2 M. D. & D. 524.

Commissioners have no jurisdiction to expunge a proof placed on the proceedings by order of the Court of Review; and they can only expunge a proof on the ground that the debt is not due. It is irregular for them to state, as a ground for expunging, that the bankrupt's liability has been discharged. *Ex parte Whitworth*, 2 M. D. & D. 164.

(*Election—retiring from proof.*)

A joint and separate creditor, who has proved against the joint estate, not permitted, without special grounds, to retire from his proof, and to prove against the separate estate. *Ex parte Dixon*, 2 M. D. & D. 312.

(*Rejection by Commissioners.*)

Where Commissioners have not admitted a proof tendered to them, the Court may direct it to be placed on the proceedings at once, without referring it back to the Commissioners, although the proof may not have been

rejected, but only adjourned. *Ex parte Whitworth*, 2 M. D. & D. [158](#).

Petition complaining of rejection of, neither sets forth the grounds of the rejection, nor states that none were assigned. *Held*, that the petition might nevertheless be heard. *Ex parte Mudie*, 2 M. D. & D. [490](#).

(*Petition to prove.*)

Costs of petition to prove against estate of executor for breach of trust come out of his estate. *Ex parte Bridgman*, 2 M. D. & D. [692](#).

(*Consequence of not proving.*)

A creditor who has not proved cannot petition to stay certificate. *Ex parte Merton*, 2 M. D. & D. [442](#).

A creditor who has not proved may petition to remove assignee, but he must swear to his debt. *Ex parte Barnett*, 2 M. D. & D. [692](#).

PROTECTED TRANSACTIONS.

In trover by assignees of a bankrupt against the sheriff, the latter justified under a judgment recovered in this Court; a *fi. fa.* issued thereon, and a seizure, before the fiat. The plea also stated a sale of the goods, but without averring it was before the fiat, and alleged that at the time of the seizure S., the execution creditor, had no notice of any prior act of bankruptcy. The replication stated that before the judgment was recovered, the bankrupt made his warrant of attorney, authorising certain attorneys to appear for him and receive a de-

claration of debt at the suit of S., and thereupon to confess such action, or else to suffer judgment by *nil dicit* or otherwise to pass against him in such action, to be forthwith entered up against him of record; it then averred that the judgment in the plea mentioned was had and obtained on the said warrant of attorney, and that it was given by way of fraudulent preference. The rejoinder only denied that the warrant of attorney was given by way of fraudulent preference, and the jury found the issue for the defendants. *Held*, that the plaintiffs were entitled to judgment *non obstante veredicto*, it being admitted on the record that the judgment was obtained on the warrant of attorney, which could only authorize a judgment by confession, *nil dicit*, or other default, and therefore that the case was within [6 Geo. 4. c. 16. s. 106.](#), and the execution was not protected by [2 & 3 Vict. c. 29. Rawdon v. Wentworth, 10 Mees. & Wels. 36.](#)

A creditor, on a judgment founded upon a warrant of attorney, issued execution thereon, and seized and sold the goods of the debtor under a *fi. fa.* without notice of any act of bankruptcy committed by the debtor. On the day after the sale, a fiat in bankruptcy issued against the debtor. *Held*, that the assignees were not entitled to recover from the creditor the proceeds of the sale, inasmuch as at the time of the fiat he was not a creditor of the bankrupt within the [6 Geo. 4. c. 16. s. 108.](#) Notice to a sheriff's

officer in possession under a *fi. fa.* of an act of bankruptcy committed by the defendants is not notice within the 2 & 3 Vict. c. 29. *Semble*, a general notice to the creditor that the debtor has committed an act of bankruptcy, is sufficient, without stating the nature of it. *Ramsey v. Eaton*, 10 Mees. & Wels. 22.

A. and *B.* brothers being partners in trade, and *B.* being largely indebted to the partnership, *B.* borrowed 500*L.* from a loan company, which was secured by a bond of *C.* (the uncle of *A.* and *B.*) and two other persons, and by a policy of assurance on *B.*'s life. Of this sum *B.* paid 400*L.* into the partnership funds; *B.* afterwards executed a warrant of attorney in favour of *C.*, to indemnify him against the consequences of the bond. *B.* having made default in payment of the premiums on the policy of assurance, the loan company called on *C.* for payment under this bond, whereupon *C.* entered up judgment on the warrant of attorney against *B.*, and issued a *fi. fa.* thereon, which was levied on the partnership effects on 5th August, 1840. At that time *A.* and *B.* were in a state of hopeless insolvency. On the 7th August another *fi. fa.*, at the suit of another creditor, was issued against *B.*, and levied on the partnership effects. On the 8th August *A.*, in the name of the partnership, endorsed and delivered to *C.* on account of his claim against *B.*, bills of exchange drawn by *A.* and *B.* for 81*L.*, which were paid at maturity, and on

the 10th *A.* paid to *C.*, on the same account, out of the monies of the firm, a further sum of 80*L.* in cash. On the 10th a docket was struck against *A.* and *B.* and on the 12th a fiat was issued against them, grounded on an act of bankruptcy committed on the 5th August; and on the 13th they were duly adjudged bankrupts. *Held*, that the assignees were entitled to recover from *C.* the amount of the payments so made to him on the 8th and 10th August, and that they were not protected by 2 & 3 Vict. c. 29., not being payments really and *bond fide* made within the meaning of that statute, even though *C.* were assumed to have received them without notice of the bankruptcy. *Semble* (per Alderson, B.), that a mere payment by a bankrupt to a creditor, after the act of bankruptcy, is not a contract, dealing, or transaction, within the meaning of 2 & 3 Vict. c. 29.; but that the case of such a payment is still governed by the 6 Geo. 4. c. 16. s. 81. *Quære*, whether these were payments made by way of fraudulent preference within that section. *Turquand v. Vanderplank*, 10 Mees. & Wels. 180.

Where an execution by *feri facias* on a judgment by warrant of attorney (not given by way of fraudulent preference) was executed by seizure after a secret act of bankruptcy, but not completed by sale of the goods seized before the issuing of the fiat, which was subsequent to the passing of the 2 & 3 Vict. c. 29: *Held*, that the execution creditor was not entitled to

the benefit of it as against the assignees of the bankrupt, the stat. 2 & 3 Vict. c. 29, not having the effect of rendering valid such executions, so as to entitle the execution creditor to the benefit of them as against the assignees, nor repealed the 108th section of the 6 Geo. 4. c. 16. *Whitmore v. Robertson*, 8 Mees. & Wels. 463.

The protection given by the statute 2 & 3 Vict. c. 29. s. 1. to contracts with bankrupts and executions against their goods *bona fide* executed or levied before the date and issuing of the fiat in bankruptcy, is *not* receivable in evidence in an action of trover by the assignees against an execution creditor, either under the plea of not guilty, or a plea that the plaintiffs were not lawfully possessed of the goods as assignees at the time of the alleged conversion.

Seemle also, that the latter plea does not render it necessary for the plaintiffs to prove the petitioning creditor's debt. *Byers v. Southwell*, 2 Car. & Pay. 320.

A payment by a trader to a creditor, by way of composition, the former not contemplating and the latter having no notice of an act of bankruptcy, is a payment really and *bona fide* made within 6 Geo. 4. c. 16. s. 82. *Gibson v. Muskett*, 3 Scott, N. R. 433.

In an action of trover by assignees of a bankrupt, the defendant pleaded, first, a traverse of the plaintiff's property as assignees; secondly, that after the bankruptcy, and before the fiat, the plaintiffs, as assignees, by

reason of the relation of their title to the time of the bankruptcy, although not then appointed, were owners of the goods; that the bankrupt, subject only to their said title as assignees, was possessed of the goods, and that the defendants took them under an execution *bona fide* executed and levied against him, without any notice of any prior act of bankruptcy. *Seemle*, that the latter plea amounted only to an argumentative traverse of the possession of the plaintiffs as assignees, and that therefore the two pleas could not be pleaded together. *Turquand v. Hawtrey*, 9 Mees. & Wels. 727; 1 Dow. P. C. N. S. 925.

PROTECTION FROM ARREST.

Where a party had been summoned to attend the registrar on a matter which had been referred to him by the Court, and after being examined, was arrested near the outer door of the registrar's office, he was ordered to be discharged, but without costs against the officer, as he would not undertake to bring an action for false imprisonment. *Ex parte Burt*, 2 M. D. & D. 666.

RECOVER.

See JUDGMENT.

REGISTRAR.

(*Witness attending before.*)

See PROTECTION FROM ARREST.

RE-HEARING.

After a petition has been heard by the Court of Review, and the order

made on it confirmed on appeal by the Lord Chancellor, the Court will not re-hear the petition on the ground that the party has discovered a new fact, which, if he had used due diligence, he might have known before the former hearing, more especially when the object appeared to be to raise a chance of a different decision in the Court of Appeal. *Ex parte Pennell*, 2 M. D. & D. 598.

A petition for re-hearing will be dismissed, unless some new fact of importance is stated to have been discovered since the former hearing. *Ex parte Mould*, 2 M. D. & D. 714.

On ground of mistake in petition. See PETITION.

RELATION.

A., who possessed a real estate, committed an act of bankruptcy; he afterwards took the benefit of the Insolvent Debtors' Act, and was subsequently declared bankrupt. *Held*, that the assignees in bankruptcy could not make a good title to the real estate of the bankrupt; that the estate was vested in the assignee of the insolvency, and that the objection was one of title, and not of conveyance. *Sidebotham v. Barrington*, 3 Bea. 524.

RELATION TO ACT OF BANKRUPTCY.

See ACT OF BANKRUPTCY—PROTECTED TRANSACTIONS—REPUTED OWNERSHIP.

RENT.

See LANDLORD AND TENANT.

REPUTED OWNERSHIP.

A., a London merchant, in London, on the 17th of February bought of *B.*, an oil merchant at Hull, ten tuns of oil, which were paid for by *A.*'s acceptance for the amount of the price. Upon the completion of the purchase, the oil was drawn off from the cisterns in which *B.* kept his stock, and put into nineteen casks, which were numbered and marked with *B.*'s initials, and removed into another warehouse, called the shipping warehouse, to await *A.*'s orders as to the shipment on the 9th of March. *A.* demanded the delivery of the oil, but *B.*, having then suspended payment, said that he could not deliver the oil without authority. On the 3rd April a fiat was issued against *B.* *Held*, that the oil was not in the possession of *B.* as reputed owner within the meaning of the 6 Geo. 4. c. 16. s. 72., it being necessary to prove some reputation of ownership besides the mere fact of possession to bring the case within the provisions of the enactment. *Ex parte Dover*, 2 M. D. & D. 259.

To a count in trover for goods seized by the defendant as sheriff, the defendant pleaded not possessed: the plaintiff claimed to be entitled to the goods in question under a bill of sale by which they had been conveyed to him by *C.*: it was proved that *C.* had continued in possession of the goods, with the consent of the plaintiff, after the execution of the bill of sale; and that while so in possession he became

bankrupt: the assignees under the fiat at first repudiated, by the act of their messenger, all title to the goods; but subsequently, upon the goods being seized by the sheriff at the suit of another person, asserted their title, and having indemnified the sheriff, received from him the proceeds of the sale of the goods. *Held*, first, that the goods were in the order and disposition of the bankrupt at the time of his bankruptcy, with the consent of the true owner, within the 6 Geo. 4. c. 16, s. 72. Secondly, that under the plea of not possessed the defendant in the suit was entitled to set up the title of the assignees to the goods; and that that title reverted back to the date of the bankruptcy, notwithstanding the act of the messenger under the fiat. *Leake v. Loveday*, 2 Dowl. P. C. N. S. 624.

Two of the next of kin of an innkeeper who dies intestate carry on the business in their own names, and pay some of the intestate's debts, but do not take out administration to her estate; they afterwards become bankrupt, and then another of the next of kin takes out administration. *Held*, that the stock in trade and fixtures belonged to the administrator, and did not pass to the assignees under the 72nd section; the case of *Fox v. Fisher* not establishing, generally, that effects in a bankrupt's hands as an executor *de son tort* are within the operation of that section. *Ex parte Thomas*, 2 M. D. & D. 294; 1 Phill. 159, S. C.

In an action brought by plaintiffs

as assignees of *R. S.*, the charterer of a certain ship, against *G. C.* as owner, for alleged breaches of the charter party, it being admitted on the pleadings that the bankrupt was left in sole possession and management of the cargo, with full power to dispose of or gain credit upon any portion of it, and having parted with no document that was essential to his power of disposal. *Held*, that it passed to the plaintiff as goods in the order and disposition of the bankrupt at the time of his bankruptcy, under 6 Geo. 4. c. 16, s. 72. *Belcher v. Capper and others*, 5 Scott N. R. 257.

S. and *O.* assign all their stock and effects to trustees, for the benefit of their creditors, and dissolve their partnership; *S.* continues on the same premises, and carries on a different branch of trade, and soon afterwards takes in *H.* as a partner. Part of the stock of *S.* and *O.* which had been assigned to the trustees, was a quantity of New Zealand flax, which remained unsold upon the premises, but was separately warehoused and kept distinct from the stock of the new partnership, and was not adapted for the new manufacture carried on by *S.* and *H.*, and six months afterwards a joint fiat against *S.* and *O.* *Held*, that the trustees were entitled to the flax, and that the clause of order and disposition did not apply to such a state of circumstances. *Ex parte Vardon*, 2 M. D. & D. 694.

Fixtures are not within 6 Geo. 4. c. 16, s. 72. *Sim v. Grazebrook*, 4

Scott, N. R. 565; *Ex parte Heathcoate*, 2 M. D. & D. 711.

And see FIXTURES.

The defendants, with whom the bankrupt had deposited a policy of assurance as security for an advance of money, sent an agent to the office for the purpose of ascertaining whether the bankrupt had paid the premium, with directions to him to pay it if the bankrupt had omitted to do so. The agent told a clerk in the office that the policy had been so deposited with the defendants.

Semble, that this was not such a notice to the office as to take the policy out of the order and disposition of the bankrupt, the practice of the office requiring the notice to be in writing. But, *held*, that it was a circumstance amongst others, upon which the jury were to exercise their judgment. *Edwards v. Scott*, 2 Scott, N. R. 266.

The bankrupt was a shareholder in a joint stock banking company, one of the rules of which was, that the bank should have a lien on the shares of every shareholder for any balance due from him to the company; the bankrupt also carried on the separate trade of a banker, under the firm of "Young & Co.," and was indebted to the banking company in a large balance on a running account; to secure this balance, in addition to the company's lien on the shares of the bankrupt, he had deposited with the company two policies of life assurance, and other securities, but no

notice of the deposit had been given to the insurance office. *Held*, 1st. That, no joint creditors of the banking company having proved under the fiat, the company were entitled to prove for the residue of their debts, after deducting the proceeds of their securities; 2ndly. That the want of notice to the insurance office was not conclusive evidence of the policies being in the reputed ownership of the bankrupt, and that no evidence having been adduced of such reputed ownership, the banking company were entitled to the premises in question. *Ex parte Cooper*, 2 M. D. & D. 1.

Reputed ownership in a policy is a fact to be proved, and not to be conclusively inferred from absence of notice to the office of a change of ownership. *Ex parte Heathcoate*, 2 M. D. & D. 711.

H. being a trader, and the local agent of an insurance company, whose head office was in Dublin, effected two policies of insurance with the company upon his own life, and subsequently assigned these policies over to a banking company, to which he was largely indebted. At the time of the assignments respectively, a formal notice was given to him as agent of the company; *H.* subsequently became bankrupt, and afterwards died. On a contest between the assignee of the policies and the general body of creditors, *held*, that the notice was insufficient, being a Dublin one, there being nothing on the face of the policies to show that

they were effected in the place for which *H.* was the agent. *In re Hennessey*, 2 Dr. & War. 555; 1 Con. & Law. 559, S. C.

Semble, where the agent and assignee are the same person, notice to the agent is not sufficient. *Ibid.*

All the assured in the Equitable Assurance Office are partners in the society, and therefore express notice of an assignment of a policy effected with that society need not be given to take it out of the order and disposition of the assignor. *Duncan v. Chamberlayne*, 11 Sim. 123.

Although no notice is given to an insurance office of the deposit of a policy with an equitable mortgagee, *semble*, that it is not a case of reputed ownership, unless some evidence is offered that the bankrupt was still reputed to be the owner. *Ex parte Rose*, 2 M. D. & D. 131.

When the policy is effected by the bankrupt with a mutual assurance company, in which all the insurers are considered as partners, such a notice is not necessary. *Ibid.*

Where the bankrupt, who was a director of a joint stock company, mortgaged his shares to secure an advance of money, but stipulated that no notice should be given of the transaction to the company, not wishing it to be known to his brother directors, and the mortgagee acceded to this stipulation, the shares were to be held to be in the order and disposition of the bankrupt, within the meaning of the 6 Geo. 4. c. 16. s.

72. *Ex parte Nutting*, 2 M. D. & D. 302.

Reputed ownership of shares must be proved, and is not to be conclusively inferred from the absence of notice of any lien upon them. *Ex parte Pooley*, 2 M. D. & D. 505.

The mortgagee of a ship by bill of sale, who has omitted to procure an endorsement thereof on the certificate of registry, within thirty days after the return of the ship to port, as required by the registry act, the registered owner having after that time become bankrupt, has no equity distinct from his legal rights to restrain the sale of the ship by the assignees, the title to the ship after the bankruptcy depending upon the rule of law with regard to order and disposition. *Campbell v. Thompson*, 2 Hare, 140.

And see MORTGAGE—NOTICE.

(*For reputed ownership in cases of dissolution of partnership.*)

See PARTNERSHIP.

SCOTLAND.

Fiat issued on affidavit sworn there. *Ex parte Rumsey*, 2 M. D. & D. 571.

SCRIVENER.

See TRADING.

SECOND FIAT.

A bankrupt having obtained his certificate under a second bankruptcy, but not having paid fifteen shillings in

the pound, sets up as a tailor and draper, and sends circulars soliciting custom to several of the creditors who have proved under the second bankruptcy, and among others to one of the creditors' assignees. He continues to trade for five years, without molestation on the part of the creditors, having his name conspicuously written on the trade premises, and having exposed to view there stock in trade of considerable value, and then becomes bankrupt a third time. *Held*, that the assignee under the last bankruptcy could not be called upon to deliver up the assets collected by him to the assignees under the second fiat. *Ex parte Jungmichel*, 2 M. D. & D. 471.

Assignee under a second commission, under which the bankrupt obtains his certificate, but does not pay 15s. in the pound, lies by while the bankrupt is subsequently trading to a great extent for a period of eight years, without making any claim to his subsequently acquired property, the party then becomes bankrupt a third time. *Held*, that the assignee under the third bankruptcy, and not the assignee under the second commission, had on principles of equity the preferable claim to the property thus subsequently acquired. *Held* also that such principle of equity applied as well to real as to personal estate, notwithstanding the clause 6 Geo. 4. c. 16. s. 72. only applies to personal estate. *Ex parte Butler*, 2 M. D. & D. 731.

SECURITY

(For costs.)

See COSTS.

(Proof without giving up.)

See PROOF.

SEPARATE FIAT.

(Annuling.)

See FIAT.

SEPARATE USE.

See MARRIED WOMAN.

SERVANT.

The mate of a vessel, hired by the master, who was also one of the owners, at certain wages, is a servant within the meaning of the 4th section of the 6 Geo. 4. c. 16., and is consequently entitled to six months' wages upon the bankruptcy of the master of the vessel. *Ex parte Homberg*, 2 M. D. & D. 642.

Seem, that the misconduct of a clerk may deprive him of his right under the 48th section of the 6 Geo. 4. c. 16. to be paid six months' salary in full. *Ex parte Hampson*, 2 M. D. & D. 462.

Where an affidavit, in opposition to a petition claiming this right, stated that on the clerk's accounts being taken, it would appear that by his imprudence property of his employer had been lost, this in the affidavit was ordered to be expunged, as scandalous and impertinent, the respondents not having proposed to take the accounts and sustain the charge. *Ibid*.

The payment in full directed by the 48th section is not to be made out of the first monies got in, but as soon as there is a sufficient fund for the purpose, after proceeding for the expenses of working the fiat. *Ibid.*

SET-OFF.

Commissioners are empowered by an act of parliament to levy rates and duties on vessels entering a harbour, and also tolls on vessels navigating a river communicating with the harbour, and they are required to apply the rates and duties in the improvement of the harbour, and the tolls in the improvement of the river. They deposit the monies received by them with one of their number, who is a banker, and acts as treasurer, and the accounts and drafts relating to the harbour and river are separated and distinguished from each other, the banker having failed, *held*, that a debt due from him on one account might be set off against a debt due to him on the other, and that the assignees might be restrained from proceeding against the commissioners to recover the latter debt, although the set-off would furnish a good legal defence. *Ex parte Pearce*, 2 M. D. & D. 142.

Assumpsit by the assignees of a bankrupt for goods sold and delivered by the bankrupt, with counts for money paid, had and received, and on an account stated. The defendant pleaded by way of set-off, that before notice of any act of bankruptcy, and

before issuing of the fiat, and before action brought, the defendant gave credit to the bankrupt by accepting certain bills of exchange for his accommodation, and at his request, without any consideration or value; which said bills were, before notice of the bankruptcy, negotiated by the bankrupt for his own use and benefit; that the credits so given were likely to end in debts from the bankrupt to the defendants; and that afterwards and before the commencement of the action, the defendant paid the said bills. *Held* a good set-off under the 6 Geo. 4. c. 16. s. 50, on the ground that a mutual credit was shown. *Held*, also, that the assignees could not reply a fraudulent delivery of the goods. *Russell v. Bell*, 8 Mees. & Wels. 277.

And see MARRIED WOMEN.

SHARES.

(*Following and identifying.*)

See TRUST.

(*In Company, Mortgage of.*)

See MORTGAGE.

SHORT BILLS.

See ASSIGNEES.

(*Property passing to.*)

SHIP REGISTRY ACTS.

See REPUTED OWNERSHIP.

SOLICITOR.

See COSTS—LIEN.

SPECIAL CASE.

See BANKRUPTCY—FACT, QUESTION OF.

STAMP.

An agreement for sale of a bankrupt's property by his assignees is exempted from stamp duty by [6 G. 4. c. 16. s. 98.](#) *Flather v. Stubbs*, [2 G. & D. 290.](#)

STATUTE OF FRAUDS.

See LIQUIDATED DEMAND.

STOCK-BROKER.

See ASSIGNEES.

SUBSTITUTION.

(*Of new Petitioning Creditor's Debt.*)
See PETITIONING CREDITOR'S DEBT.

SUPPRESSION.

Of facts in affidavit on which an *ex parte* order is obtained is, of itself, sufficient ground for discharging the order. *Ex parte Davidson*, [2 M. D. & D. 371.](#)

SURETY.

A trader makes a promissory note as a surety for the debt of a firm. The firm and the trader become bankrupt, and the creditor proves against the estate of the trader on the note, and against the separate estate of a partner in the firm on the debt; a dividend is declared and paid on the former proof, but not on the latter. *Held*, that the assignees of the trader were not entitled to an order to prove against the joint estate of the firm for the amount of the dividend which they had paid on the promissory note. *Ex parte Brown*, [2 M. D. & D. 718.](#)

The rule that where a man agrees to pay on demand a debt not his own, demand is necessary to create a right of action against him, does not apply to the case of a joint and several promissory note in which one of the makers is known to join only as a surety for the other. *Ex parte Whitworth*, [2 M. D. & D. 158.](#)

Bankers make an advance to a customer on the security of a joint promissory note of himself and a surety; the customer afterwards pays into the bank generally sums exceeding the amount of the advance, and also draws out a still larger amount, and becomes bankrupt. *Held*, that the surety is not entitled to have the payments appropriated in discharge of the sum secured by the note. *Ibid.* [164.](#)

On the 1st February the plaintiffs commenced an action against *G.* and *G.* to recover the amount of a bill of exchange for [468*l.* 1*s.* 9*d.*](#), and also a large sum for goods sold and delivered and money due on an account stated. They afterwards filed an affidavit in the Court of Bankruptcy, under the [1 & 2 Vict. c. 110. s. 8.](#), alleging *G.* and *G.* to be indebted to them in [468*l.* 1*s.* 9*d.*](#), for which sum *G.* and *G.* on the 11th February gave a bond with sureties pursuant to the statute. On the 21st March, the plaintiffs signed judgment against *G.* and *G.* (against whom a fiat in bankruptcy had issued) for [1332*l.* 19*s.* 6*d.*](#), which included the [468*l.* 1*s.* 9*d.*](#) On the 5th April the plaintiffs proved their debt under the fiat, excluding

the amount of the bill of exchange in respect of which the bond had been entered into; on the 12th April they lodged a *ca. sa.* against *G. and G.*, and on the 30th May commenced actions against the sureties on the bond. *Held*, that the proof under the fiat was an election to relinquish the action against *G. and G.*, and that the principal debtors being thus entitled to be discharged if rendered pursuant to the condition of the bond, the sureties were entitled to summary relief on motion. *Geikie v. Hewson*, 5 Scott, N. R. 484.

Assumpsit for money paid. Plea, the defendant's certificate under a fiat in bankruptcy, that the money was paid for a debt of defendant due before his bankruptcy, for which plaintiff was surety; and that plaintiff paid the money without any request from defendant, except the request supposed to arise by law from the premises. Replication, that before money paid defendant had obtained his certificate, and that a final dividend had been made of his estate, and that there was not any debt in respect of the payment of which plaintiff could have proved, or for which he could have received any dividend.

On special demurrer to the replication, *held*, that the certificate was a discharge from the claim, as the principal creditor might have proved; and if he had, the plaintiff would have been entitled to the benefit of that proof, either in reduction of his liability to the creditor, if the cre-

ditor received the dividends, or by receiving the dividends himself, if he paid the whole debt to the creditor; or the plaintiff might have paid the debt at once to the creditor, and have himself proved before any dividend was declared; or if the creditor would not take the debt, the plaintiff might have compelled him to prove for the plaintiff's benefit. *Jackson v. Magee*, 2 Gale & Dav. 402.

TIME.

(How reckoned under 1 & 2 Vict. c. 110, s. 8.)

See ACT OF BANKRUPTCY.

(For filing Warrant of Attorney.)

See WARRANT OF ATTORNEY.

TRADING.

A person who keeps a boarding and lodging-house, where guests are entertained by the month or week, each having a bed-room to himself, but taking meals with the proprietor of the house, is a trader. *Gibson v. King*, 10 Mees. & Wels. 667; 1 Car. & Mar. 458, S. C. at Nisi Prius.

Semble, that a member of a gas company is a trader. *Ex parte Brown*, 2 M. D. & D. 758.

Where an attorney was in the habit of having the money of his clients deposited with him, to lay out for them upon mortgage, and received from others a compensation or gratuity for procuring loans of money for them, besides his charges for preparing the mortgage securities, he was *held* to be a trader within the mean-

ing of the bankrupt laws, as a money broker, and a person receiving other men's monies into his trust or custody, whether or not he might be considered liable to the bankrupt law as a banker or scrivener. *Ex parte Gem*, 2 M. D. & D. 99.

In order to render an attorney liable to the bankrupt laws as a "scrivener, receiving other men's monies into his trust or custody," it is not enough to show that he has negotiated loans, and charged negotiation money; it must distinctly appear that he has been *entrusted* (as a general means of obtaining a livelihood) in the language of the statute. *Lott v. Melville*, 3 Scott N. R. 346.

TROVER.

By assignees of equitable sub-mortgagee to recover deposited documents. *Hobson v. Mellow*, 2 Mo. & Rob. 242.

Where a bill of exchange for 1600*l.* was deposited with the defendant as an indemnity to a third person against a bond, which he had executed to the petitioning creditor, under the 1 & 2 Vict. c. 110. s. 8., and the defendant refused to deliver up the bill on the demand of the assignees of the bankrupt, although they showed him the bond in a cancelled state, and he afterwards obtained 800*l.* upon the bill: *Held*, in trover by the assignees for the bill, that the obtaining money on the bill was an actual conversion of the bill, for which the bankrupt, if no bankruptcy had in-

tervened, might have sued, and, therefore, that the case was within the 92d section of the 6 Geo. 4. c. 16., and the depositions under the fiat were conclusive evidence of the bankruptcy. *Held*, (per Lord Abinger, C. B.) that the case would have been within the section even if there had been no evidence of a conversion except the demand and refusal. *Held* also, that the production of the bond by the assignees to the defendant in a cancelled state was *prima facie* evidence that it was cancelled with the consent of the obligee. *Held* also, that inasmuch as there was a conversion of the whole bill, 1600*l.* was the proper measure of damages, although 800*l.* only remained due on the bill. *Alsager v. Close*, 10 Mee. & Wels. 576.

And see PROTECTED TRANSACTIONS.

TRUST.

See LIMITATION OVER.

TRUSTEE.

Trust-funds were invested in the purchase of transferable shares in a banking company, in the name of one of the trustees, who executed a declaration of the trusts thereof, (the rules of the company not allowing shares to stand in the names of joint owners or *cestui que trusts*.) The trustee was also a proprietor of shares in his own right in the same company, and made various sales and purchases of shares therein. There was nothing to distinguish which were

the individual shares held by the different proprietors, the same being in the nature of capital expressed by quantity. The trustee contracted to assign a certain number of shares to the banking company as a security for the advances which they made to him: he afterwards became bankrupt.

Held, that the trustee must be presumed to have transferred or pledged such shares as belonged to himself and so far as he had shares of his own, not to have transferred or pledged the shares of his cestui que trusts. *Pinkett v. Wright*, 2 Hare, 120.

That therefore the cestui que trusts were entitled to so many of the shares standing in the name of the trustee at the time of his bankruptcy as could be presumed to be identical with the shares in which the trust funds were invested, from the fact that such a number of shares had always thenceforward stood in the name of the trustee. *Ibid*.

That, having regard to the deed of association, the banking company had no lien, founded on the general relation of partnership, on the shares of a proprietor in respect of a debt owing by the proprietor to the company. *Ibid*.

That the right which the directors of the banking company might have under the deed of association, of withholding their approval of the transfer of shares, cannot be exercised for the purpose of previously

obtaining payment of a debt due to the bank from the proprietors whose shares are proposed to be transferred. *Ibid*.

That the equitable title of the cestui que trusts to the shares purchased with the trust funds was forfeited without notice to the banking company of the execution of the declaration of trust. *Ibid*.

That the special contract by the proprietor to assign his shares to the banking company as a security for their advances, gave the bank a lien on the shares then standing in the name of the proprietor, of which he was the beneficial owner, and that the same were not in his order and disposition, *semble*. *Ibid*.

A new trustee may be appointed by the Court in the first instance, under the 6 Geo. 4, c. 16, s. 79, without a reference. *Ex parte Stubbs*, 2 M. D. & D. 570.

Bankruptcy of a trustee is "becoming unfit" to act in trusts within the words of a power to appoint new trustees. *In re Roche*, 1 Con. & Law. 306; 2 Dr. & War. 287, S. C.

Trustee having a partial beneficial interest in the trust property may, by deposit of the title-deeds for a debt of his own, create a good equitable mortgage. *Ex parte Smith*, 2 M. D. & D. 587.

UNLIQUIDATED DAMAGES.

SEC PROOF—UNLIQUIDATED
DEMAND.

UNLIQUIDATED DEMAND.

See LIEN—MORTGAGE—PROOF.

VENDOR AND PURCHASER.

See LIQUIDATED DEMAND—MORTGAGE—NOTICE.

VESTED INTEREST.

See LEGACY.

WARRANT OF ATTORNEY.

Goods of one *M.* were seized on the 15th March under a fi. fa. upon a judgment on a warrant of attorney after a secret act of bankruptcy. A fiat issued against *M.* on the 18th April, and the goods were sold on 2d May. *Held*, that the execution was defeated by the bankruptcy. *Lackington v. M'Lachlan*, 5 Scott N. R. 874.

Sect. 1 of statute 3 Geo. 4. c. 39. enacts, that warrants of attorney to confess judgment shall be filed "within twenty-one days after the execution." Sect. 2 enacts, that unless they "be filed as aforesaid within the space of twenty-one days after the execution," or unless judgment be signed or execution issued within the same period, this and the judgment and execution thereon shall be fraudulent and void against the assignees of the party giving the warrant, if he become bankrupt after the expiration of twenty-one days next after the execution of the warrant. *Held*, that the twenty-one days for filing are to be reckoned exclusively of the day of execution, and that a warrant executed on the 9th Decem-

ber, and filed on the 30th December, was in time. *Williams v. Burgess*, 12 Ad. & El. 635.

A warrant of attorney which has not been filed, and on which judgment has not been signed or execution issued within twenty-one days from the execution thereof, pursuant to 3 Geo. 4. c. 39., is fraudulent and void as against assignees, though the petitioning creditor's debts upon which the fiat is founded did not exist at the time of the execution of the warrant of attorney, or within the twenty-one days. *Everett v. Wells*, 2 Scott N. R. 525; 2 Man. & Gr. 269, S. C.

Semble, that such security is liable to be defeated by bankruptcy at any distance of time, unless execution be actually executed. *Ibid*.

An attorney acting on behalf of the plaintiff cannot validly attest the execution of a warrant of attorney, under the 1 & 2 Vict. c. 110. s. 9., although named by the defendant himself, who knows him to be the plaintiff's attorney. The application may be made at the instance of the defendant's assignees, and as the warrant is a nullity, delay is immaterial, in applying to set aside a judgment and execution signed and issued thereon. *Cocks v. Edwards*, 2 Dow. P. C., N. S. 55.

The decision of the Court of Exchequer, "that the 2 & 3 Vict. c. 29., has not rendered valid executions or judgments on warrants of attorney executed by seizure after a

secret act of bankruptcy, but not completed by a sale of the goods prior to the issuing of the fiat," affirmed on error. *Skey v. Carter*, 2 Dow. N. S. 831.

WARRANT OF COMMISSIONERS.

The plaintiff was summoned by Commissioners of bankrupt to appear before them at eleven o'clock, and produce an indenture. He appeared at eleven, and afterwards at one. While the Commissioners were engaged with another case he left. He was subsequently apprehended by virtue of a warrant issued by the Commissioners, which, after reciting the summons, directed the officer to bring the plaintiff "to be examined

as aforesaid, and to produce the said assignment." *Held*, 1. that the warrant was regular, inasmuch as it was the duty of the plaintiff to wait until the Commissioners were ready to examine him. 2. That the warrant was not vitiated by the introduction of the words "to be examined and to produce the said assignment." *Wright v. Maude*, 2 Dow. P. C. N. S. 517.

WIFE.

See MARRIED WOMAN.

WITNESS.

To prove act of bankruptcy under 1 & 2 Vict. c. 110. s. 8., attendance of, dispensed with at opening of fiat. *Ex parte Bowman*, 2 M. D. & D. 90.

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